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United States
Circuit Court of Appeals
For the Ninth Circuit.

F. G. NOYES, as Receiver of WASHINGTON-
ALASKA BANK, a Corporation,
Appellant,
vs.

R. C. WOOD, JOHN L. MCGINN, RAY BRUM-
BAUGH, J. A. JESSON, JAMES W. HILL,
E. R. PEOPLES, J. A. HEALEY, JOHN A.
CLARK and GEORGE PRESTON,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court
for the Territory of Alaska, Fourth Division.

F. D. Monckton,
Clerk.

JUL 1 - 1915

Filed

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court for the Territory of Alaska,
Fourth Judicial Division.*

No. 1756.

F. G. NOYES, Receiver of Washington-Alaska
Bank, a Corporation, Organized Under the
Laws of the State of Nevada,

Plaintiff,

VS

J. A. JESSON, D. H. JONAS, DAVID YARNELL,
DAN RYAN, JOHN L. McGINN, R. C.
WOOD, C. J. ROBINSON, W. H. McMUL-
LEN, C. E. CLAYPOOL, ROBERT SHEP-
PARD, HANS STARK, JOHN FLYGAR,
JOHN P. ANDERSON, E. R. PEOPLES,
JAMES W. HILL, RAY BRUMBAUGH, J.
A. JACKSON, JOHN DUSENBURY AND
L. N. JESSON,

Defendants.

Names and Addresses of Attorneys of Record.

O. L. RIDER, Venite, Oklahoma, R. F. ROTH, Fair-
banks, Alaska,

Attorneys for Plaintiff and Appellants.

JOHN L. McGINN, Keystone Apartments, San
Francisco, Cal., A. R. HEILIG, Fairbanks,
Alaska,

Attorneys for defendants and Appellees.

[1*]

*Page-number appearing at foot of page of original certified Record.

[Title of Court and Cause.]

Stipulation as to the Printing of the Record.

It is hereby stipulated and agreed that in the printing of the record herein for the consideration of the Court on appeal and cross-appeal that the title of the Court and cause in full on all the pages shall be omitted except on the first page, and inserted in place and stead therein "Title of Court and Cause."

Dated at Iditarod, Alaska, this 6th day of July, 1914.

O. L. RIDER,

Attorney for Plaintiff.

McGOWAN & CLARK,

A. R. HEILIG,

JOHN L. McGINN.

Attorneys for Defendants, Wood, Hill, Peoples,
Brumbaugh, McGinn and J. A. Jesson.

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. July 6, 1914. Angus McBride, Clerk. [2]

[Title of Court and Cause.]

**Praeipice Indicating Portions of the Record to be
Incorporated into the Transcript on Cross-Ap-
peal.**

To the Clerk of said Court:

Please prepare transcript of the record on the cross-appeal of the plaintiff in the above-entitled suit, and incorporate therein the following portions of said record only, to wit:

1. Amended complaint of plaintiff, filed on the 23 day of May, 1913.
2. Separate answer of defendants Wood, Healey and McGinn, filed on the 29 day of Sept., 1913.
3. Demurrer to the separate answer of Wood, Healey and McGinn, filed on the 2 day of Oct., 1913.
4. Ruling on said demurrer, entered on the 18th day of April, 1914.
5. Reply to separate answer of Wood, Healey and McGinn, filed on the 21 day of April, 1914.
6. Amended answer of J. A. Jesson, Brumbaugh, Peoples, Hill, Clark and Preston, filed on the 21 day of April, 1914.
7. Motion to strike portions of amended answer of J. A. Jesson, Brumbaugh, Peoples, Hill, Clark and Preston, filed on the 22 day of April, 1914.
8. Order sustaining the motion to strike, entered on the 22 day of April, 1914. [3]
9. Reply to amended answer of defendants J. A. Jesson, Brumbaugh, Peoples, Hill, Clark and Preston, filed on the 22 day of April, 1914.
10. Findings of fact and conclusions of law, filed on the 11 day of June, 1914.
11. Judgment and decree, entered on the 15 day of June, 1914.
12. Plaintiff's bill of exceptions, filed on the 6 day of July, 1914.
13. Order settling plaintiff's bill of exceptions, entered on the 6 day of July, 1914.

14. Plaintiff's petition for appeal, filed 28 day of Jan., 1915.
15. Order allowing plaintiff's appeal, entered on the 28 day of Jan., 1915.
16. Plaintiff's assignment of errors, filed on the 28 day of Jan., 1915.
17. Plaintiff's bond on appeal and order approving same, filed on the 20th day of February, 1915.
18. Citation on plaintiff's appeal, and service thereon, filed on the 28 day of Jan., 1915.
19. Order extending return day and time for docketing said cause on plaintiff's appeal, filed on the 20th day of February, 1915.
20. Stipulation for printing transcript on appeal, filed on the 6 day of July, 1914.
21. Praecipe for transcript on plaintiff's appeal, filed on the 28 day of Jan., 1915.

Signed this 9th day of September, A. D. 1914.

O. L. RIDER,
Attorney for Plaintiff.

[Endorsed]: No. 1756. F. G. Noyes, Receiver, etc., Plaintiff, vs. J. A. Jesson et al., Defendants. Praecipe for Transcript on Cross-appeal.

Filed in the District Court, Territory of Alaska, 4th Div. Jan. 28, 1915. Angus McBride, Clerk.

[4]

[Title of Court and Cause.]

Amended Complaint.

Plaintiff complains of defendants and for cause of action alleges:

(I)

The Washington-Alaska Bank is, and ever since the 21st day of January, 1908, has been a corporation duly organized and existing under and by virtue of the laws of the State of Nevada. Said Washington-Alaska Bank was originally incorporated under the corporate name of "The Fairbanks Banking Company," but afterward, on or about, or shortly prior to, the 14th day of September, 1910, its name was by amendments to its articles of incorporation duly changed to "Washington-Alaska Bank." The authorized capital stock of plaintiff corporation is and was at all times since its incorporation \$300,000.00, divided into 3,000 shares of the par value of \$100.00 each. In and by the articles of incorporation of said Fairbanks Banking Company, a corporation, it was provided among other things that the Board of Directors of said corporation should consist of twelve members, four to hold office for six months, or until their successors were elected and qualified, four to hold office for twelve months, or until their successors [5] were elected and qualified, and four to hold office for eighteen months, or until their successors were elected and qualified.

(II)

On and prior to the 14th day of March, 1908, the defendants R. C. Wood and James W. Hill, and one

E. T. Barnette, were, as partners, engaged in the business of banking at the city of Fairbanks, Territory of Alaska, under the firm name and style of "The Fairbanks Banking Company."

(III)

The Fairbanks Banking Company, a corporation, was organized for the purpose of taking over and acquiring the business heretofore conducted and carried on by the Fairbanks Banking Company, a partnership, as hereinbefore alleged, and for the purpose of promoting, organizing and commencing the business of said Fairbanks Banking Company, a corporation, the said E. T. Barnette, R. C. Wood and James W. Hill, circulated and caused to be circulated in the city of Fairbanks and vicinity, stock subscription lists subscribing to the capital stock of said corporation, which said stock subscription lists, omitting the signatures, were in words and figures as follows:

"KNOW ALL MEN BY THESE PRESENTS: That, whereas, the organization of a corporation is contemplated by the undersigned under the laws of the State of Nevada, to be known as the Fairbanks Banking Company, with a capital stock of Three Hundred Thousand Dollars, divided into Three Thousand shares of the par value of One Hundred Dollars each. The object of which said corporation is to carry on a general banking business in the town of Fairbanks, Alaska, and to absorb the present Fairbanks Banking Company, and such other banking institutions as may be deemed advisable; and whereas steps are now being taken for the organiza-

tion of such corporation under the laws of said State of Nevada, but owing to the distance between said State of Nevada and the town of Fairbanks, Alaska, considerable delay must necessarily ensue before such corporation can be created and the organization thereof perfected; and whereas, we, the undersigned, each and all of us are desirous of becoming stockholders in said corporation for the number of shares hereinafter by us set opposite our respective names, and are desirous that in order that the capital stock of said corporation shall be fully subscribed, and the names and number of stockholders of said new corporation may be known to us, that subscriptions for such stock should now be made.

NOW, THEREFORE, in consideration of the premises, we, the undersigned, do hereby promise and agree to and with each other and with said new corporation to be formed [6] to be known as the Fairbanks Banking Company, to subscribe, and each of us do hereby subscribe of the capital stock of said Fairbanks Banking Company, the number of shares by us set opposite our respective names and that when said corporation is organized and the stock thereof issued to us we will either pay to the treasurer of said corporation the par value thereof, or such an amount thereof as we can conveniently pay; or, in the event at said time we are unable to make any cash payment upon said stock, that each will give his promissory note for the individual amount of stock subscribed by him; one due on or before the first day of June, 1908, for twenty-five per cent of the amount of the capital stock subscribed by him,

and the other for seventy-five per cent thereof, which shall become due and payable on or before the first day of July, 1908; said notes to bear interest at the rate of one per cent per month from the date of the issuance of the stock. If at the time the stock shall be issued any of the undersigned shall pay thereof an amount equal to twenty-five per cent thereof, then such person is to execute his note for the remaining seventy-five per cent due on or before the first day of July, 1908. If said payment so made shall not equal twenty-five per cent of the par value thereof then such individual agrees to execute a note for the amount equal to twenty-five per cent thereof, which shall become due and payable on or before the first day of June, 1908, and a note for the remaining seventy-five per cent as hereinbefore set forth. It is expressly understood and agreed that said corporation is to retain and remain the owners of stock until the same is fully paid.

IN WITNESS WHEREOF we have hereunto set our hands and seals this —— day of January, 1908.”

(IV)

Said subscription lists were headed by said E. T. Barnette, subscribing for 440 shares of the capital stock of said corporation; R. C. Wood, 220 shares; James W. Hill, 220 shares; and were then signed by various other persons, the total subscriptions aggregating over 2,400 shares. The defendant John L. McGinn subscribed for 100 shares; the defendant J. A. Jesson for 100 shares; the defendant D. H. Jonas for 100 shares; the defendant David Yarnall for 100 shares; the defendant L. H. Jesson for 100

shares; the defendant John Flygar for 20 shares; the defendant Hans Stark for 100 shares; the defendant Dan Ryan for 25 shares; the defendant C. R. Claypool for 50 shares; the defendant C. J. Robinson for 50 shares; the defendant B. R. Dusenbury for 50 shares; the defendant J. A. Healey for 5 shares; the defendant George Preston for 5 shares; and the defendant John P. Anderson for 25 shares. [7]

(V)

The first meeting of the incorporators and the subscribers to the capital stock of said Fairbanks Banking Company, a corporation, was held at the city of Fairbanks, Alaska, on March 12, 1908, and a Board of twelve Directors for said corporation, named and selected by E. T. Barnette, were elected, and a resolution passed and entered on the minutes as follows:

“RESOLVED, that the matter of taking over the property of the Fairbanks Banking Company, the copartnership, consisting of E. T. Barnette, J. W. Hill and R. C. Wood, be left to the Board of Directors.” Said first Board of Directors was composed of said E. T. Barnette, and the defendants David Yarnall, J. A. Jesson, D. H. Jonas, Dan Ryan, C. J. Robinson, M. H. McMullen, C. E. Claypool, Robert Sheppard, Hans Stark, John Flygar and John P. Anderson.

(VI)

On the 12th day of March, 1908, said Board of Directors met at the city of Fairbanks, Alaska, and elected as officers of said corporation, E. T. Barnette, president; the defendant James W. Hill, vice-president; the defendant R. C. Wood, cashier; and the

defendant B. R. Dusenbury, assistant cashier, secretary and treasurer, and on the 13th day of March, 1908, said Board of Directors held an adjourned meeting, and authorized the acquisition and purchase by the Fairbanks Banking Company, a corporation, of the assets and business of the Fairbanks Banking Company, a partnership, and thereafter said purchase and acquisition, and the terms thereof were reduced to writing in a contract signed and executed by the parties, dated March 16th, 1908, a true copy of which is hereto annexed marked "EXHIBIT ONE" and made a part of this complaint.

(VII)

That in accordance with said contract "EXHIBIT ONE," stock in said corporation, the Fairbanks Banking Company, was issued to E. T. Barnette, 260 shares; James W. Hill, 130 shares; and R. C. [8] Wood, 120 shares; and the assets of said copartnership enumerated and described in said contract "EXHIBIT ONE" were transferred to said corporation. On March 14th, 1908, there was also issued to the various subscribers therefor, stock in said corporation to the amount of 1502 shares, of the par value of \$150,200.00, and thereupon the said corporation, on March 16th, 1908, commenced business as a bank at said city of Fairbanks, Territory of Alaska, and thereafter continued to carry on and conduct said business until and including January 4th, 1911.

(VIII)

The capital stock of the Gold Bar Lumber Company, a corporation, which was sold and transferred

by said copartnership, the Fairbanks Banking Company, to the said Fairbanks Banking Company, a corporation, for \$341,949.00, did not cost the said copartnership in excess of the sum of \$248,067.89, at which sum it was carried on the books of said copartnership at and prior to the transfer to the said corporation, and was at the date of the transfer of a value less than \$248,067.89, and said stock was transferred to and received by said Fairbanks Banking Company, a corporation, at an arbitrarily increased and grossly fraudulent over-valuation of more than \$93,881.11, all of which was done and accomplished with full knowledge, co-operation and consent of all the defendants, Dan Ryan, C. J. Robinson, M. H. McMullen, C. E. Claypool, Robert Sheppard, Hans Stark, John Flygar, J. A. Jesson, D. H. Jonas, David Yarnall, and John P. Anderson, who were then and there Directors of said Fairbanks Banking Company, a corporation, and of the defendant R. C. Wood, who was then and there its cashier and a member of the copartnership, Fairbanks Banking Company, and of the defendant James W. Hill, who was then and there its vice-president and a member of said copartnership, and of the defendant B. R. Dusenbury, who was then and there its assistant cashier, secretary and treasurer, and of the defendant John L. McGinn, who was then and there attorney and legal adviser both of said copartnership and said corporation Fairbanks Banking Company, and who afterward [9] became a director and vice-president of said corporation, as hereinafter alleged. Said Gold Bar Lumber Company was en-

gaged in the business of manufacturing and selling lumber in the State of Washington, which business was then and there and ever since has been and still is of an exceedingly hazardous speculative nature, and the certificates representing the capital stock in said corporation, the Gold Bar Lumber Company, were not at the time of the organization of said corporation, the Fairbanks Banking Company, in the possession of said copartnership, nor were they delivered to said corporation, The Fairbanks Banking Company.

IX.

That the notes, loans and discounts sold and transferred to said Fairbanks Banking Company, a corporation, by said Fairbanks Banking Company, copartnership, were accepted by said corporation at their face value with the knowledge, consent and approval of the defendants J. A. Jesson, D. H. Jonas, David Yarnall, Dan Ryan, C. J. Robinson, M. H. McMullen, C. E. Claypool, Robert Sheppard, Hans Stark, John Flygar, John P. Anderson, R. C. Wood, James W. Hill, John L. McGinn and B. R. Dusenbury, then directors and officers of said corporation as aforesaid. That of said notes so sold and transferred as aforesaid, a large amount were then past due, worthless and uncollectible, said amount being excess of \$53,000.00, all of which are still unpaid and without substantial value, a list of which is as follows:

Maker	When due	Amount
Wm. Casey	May 31, 05	\$ 40.00
Gelling & Bechtolt	Sept, 15, 07	1050.00
Ensor & Griffith	Sept. 15, 06	435.00
Fairburn et al.	Jul. 15, 07	1332.00
E. D. Howe	Mar. 4, 07	457.25
Wm. James	Jun. 15, 07	311.97
Alex Larson	Jan. 24, 07	354.35
D. W. Truitt	Sep. 1, 07	1000.00
C. Timmerman	May 17, 05	105.00
Emily Waters	Dec. 5, 07	40.00
Wm. Barrett	Jun. 23, 06	8407.58
Jas. Frost	Jun. 1, 07	850.00
Geo. Fenwick	Nov. 31, 06	2000.00
P. Gallagher	Sep. 23, 07	133.00
W. F. Green	Aug. 1, 07	1332.74
F. Schaupp	Feb. 27, 07	3785.22
Tharp & Rusk	Sep. 14, 07	2500.00
J. Worgan	Jul. 1, 06	200.00
D. H. Berger	Jul. 28, 07	550.
J. A. York	Oct. 14, 04	100.
“ “	Feb. 1, 05	100.
“ “	Mar. 15, 05	206.
Tanana Electric Co.	Dec. 15, 07	27997.38
		<hr/>
		\$53287.49

[10]

That it was then and there well known to said defendants directors and officers as aforesaid, and by each of them or by the exercise of ordinary care might have been so known to them, and each of them, that said notes above listed were at the time

they were so accepted and transferred, past due and worthless or without substantial value.

(X)

The 1502 shares of the capital stock in said corporation, The Fairbanks Banking Company, so issued to the various subscribers therefor on March 14th, 1908, were all paid for by the promissory notes of the said various subscribers and not in cash, and a large amount of said notes were and still are worthless and uncollectible, and have never been paid, said amount being of the face value of \$22,982.33.

(XI)

With an issued capital stock of \$202,200.00, paid for as hereinbefore alleged, and not otherwise, and with no other [11] assets than those of the Fairbanks Banking Company, a copartnership, as mentioned and set forth in "EXHIBIT ONE" added to the said stock subscription notes of the face value of \$150,200.00, the Fairbanks Banking Company, a corporation, on March 16th, 1908, commenced business as a bank at said city of Fairbanks, and assumed not only the deposits debts and other liabilities of the Fairbanks Banking Company, a copartnership, amounting to \$538,940.31, but also an alleged special deposit of \$200,000.00 of E. T. Barnette, never in fact deposited by him, but being the alleged capital claimed by said Barnette, and by the contract "Exhibit One" agreed to be paid to him.

(XII)

On March 16, 1908 when said Fairbanks Bank-

ing Company, a corporation, so commenced business with said assumed liabilities of 738,940.31, said Fairbanks Banking Company, a corporation, was actually insolvent in this: That its assets were then insufficient in value to pay its debts, all of which its then directors and officers hereinbefore mentioned well knew, or by the exercise of ordinary care might have known. And furthermore, said Fairbanks Banking Company, a corporation, at and for a long time after it commenced business, was not paying and did not pay in cash or lawful money, demands made upon it in the ordinary course of business. Prior to the 16th day of March, 1908, said Fairbanks Banking Company, a copartnership, had for a considerable time ceased and failed and refused to pay in cash or lawful money demands made upon it in the ordinary course of business, and was upon what was termed a "scrip" basis; that is, was paying demands made upon it by issuing and paying out its own circulating notes. At the time said Fairbanks Banking Company, a corporation, commenced business, it assumed a liability of \$64,737.00 for outstanding circulating notes of the Fairbanks Banking Company, a copartnership, and had in cash, including gold dust, bullion and lawful money only the sum of \$38,511.87. [12]

(XIII)

Notwithstanding the facts hereinbefore and hereinafter alleged, the said Fairbanks Banking Company, a corporation, continued after the 16th day of March, 1908, to carry on the general business of banking and of receiving and soliciting deposits, and said bank

and the defendants as its directors, officers and employees at all time falsely and wrongfully represented and held out to the public generally that said Fairbanks Banking Company, a corporation, had paid-up capital stock of \$300,000.00

(XIV)

The said defendants David Yarnall, Dan Ryan, C. J. Robinson, M. H. McMullen, C. E. Claypool, Robert Sheppard, Hans Stark, John Flygar, J. A. Jesson, John P. Anderson, D. H. Jonas and said E. T. Barnette continued to be and act as directors of said Fairbanks Banking Company, a corporation, and to manage and control its business as such from said 12th day of March, 1908, until the 12th day of September, 1908, when the term of office of David Yarnall, Dan Ryan, C. J. Robinson and M. H. McMullen expired. On said 12th day of September, 1908, said David Yarnall, Dan Ryan, C. J. Robinson, were duly re-elected directors of said Fairbanks Banking Company, a corporation, for the term of eighteen months, the defendant E. R. Peoples was duly elected director of said corporation for the term of eighteen months, and the defendant James W. Hill was duly elected a director of said corporation for the term of six months to take the place of Hans Stark, resigned. For the entire period from September 12th, 1908, to March 12, 1909, the duly elected and acting Board of Directors of said Fairbanks Banking Company, a corporation, consisted of the defendants J. A. Jesson, John P. Anderson, D. H. Jonas, C. E. Claypool, Robert Sheppard, James W. Hill, John Flygar, David Yarnall, Dan Ryan, C. J. Robinson, E. R. Peoples

and said E. T. Barnette, and during said period they managed, conducted and controlled said Fairbanks Banking Company, a corporation, and its business as such. On said March 12th, 1909, said defendants C. E. Claypool, Robert Sheppard, James W. [13] Hill, and John Flygar were duly re-elected directors of said Fairbanks Banking Company, a corporation, for the term of eighteen months, and on March 13th, 1909, the defendant Ray Brumbaugh was duly elected a director of said corporation in the place of John P. Anderson, who had vacated his office by remaining absent from the District of Alaska. From and including March 13, 1909, to the 13th day of September, 1909, the duly elected and acting Board of Directors of said Fairbanks Banking Company, a corporation, were the defendants J. A. Jesson, Ray Brumbaugh, D. H. Jonas, C. E. Claypool, Robert Sheppard, James W. Hill, John Flygar, David Yarnall, Dan Ryan, C. J. Robinson, E. R. Peoples and said E. T. Barnette, and during said period they managed, conducted and controlled its business as such. On September 13th, 1909, the defendants J. A. Jesson, Ray Brumbaugh, and D. H. Jonas and said E. T. Barnette were duly re-elected directors of said Fairbanks Banking Company, a corporation, for the term of eighteen months, and the defendant John L. McGinn was duly elected a director thereof for six months to fill the place vacated by the defendant E. R. Peoples. From and including the 13th day of September, 1909, to the 12th day of April, 1910, the duly elected and acting Board of Directors of said Fairbanks Banking Company, a corporation, and

who managed, controlled and directed its business as such, consisted of the defendants J. A. Jesson, Ray Brumbaugh, D. H. Jonas, C. E. Claypool, Robert Sheppard, James W. Hill, John Flygar, David Yarnall, Dan Ryan, C. J. Robinson, and John L. McGinn, and said E. T. Barnette, except that on November 13th, 1909, the resignations as directors of Dan Ryan, and C. E. Claypool were accepted and the defendants R. C. Wood and J. A. Jackson were duly elected in their place, and from November 13th, 1909, to April 12th, 1910, the said defendants R. C. Wood and J. A. Jackson were duly elected and acting directors of said Fairbanks Banking Company, a corporation. On said April 12th, 1910, the said defendants David Yarnall, J. A. Jackson, C. J. Robinson, and John L. McGinn were duly re-elected directors of said Fairbanks Banking Company, a corporation, and thereafter and until September 12th, 1910, the [14] Board of Directors of said Fairbanks Banking Company a corporation, who managed, controlled and conducted its business as such consisted of the defendants J. A. Jesson, Ray Brumbaugh, D. H. Jonas, R. C. Wood, J. A. Jackson, Robert Sheppard, James W. Hill, John Flygar, David Yarnall, C. J. Robinson, and John L. McGinn, and said E. T. Barnette, except that on May 12th, 1910, the defendants John L. McGinn, and R. C. Wood resigned as such directors, and on said 12th day of May, 1910, the defendant John A. Clark was duly elected in the place of the defendant John L. McGinn, and thereafter served and acted as such director, and on June 11th, 1910, J. A. Healey was duly elected in the place of R. C.

Wood, and thereafter served and acted as such director. Prior to September 12th, 1910, to take effect on that day, the number of directors of said Fairbanks Banking Company, a corporation, had been duly and regularly changed by an amendment to its articles of incorporation, from twelve directors to seven directors, to hold office for one year, and on said 12th day of September, 1910, the defendants J. A. Jackson, J. A. Jesson, J. A. Clark, J. A. Healey, D. H. Jonas and George Preston and said E. T. Barnette, were duly elected directors of said Fairbanks Banking Company, a corporation and from said 12th day of September, 1910, until and including January 4th, 1911, they managed and directed and controlled the business of said corporation as such, and are still directors thereof.

(XV)

The defendant James W. Hill, although not originally a director of said Fairbanks Banking Company, a corporation, was, at the first meeting of the Board of Directors thereof, chosen and elected first Vice-president of said corporation, and the said defendant James W. Hill, accepted said office and entered upon the duties thereof, and thereafter the said defendant, James W. Hill, continued to act as such vice-president, and to assist in managing and conducting the affairs and business of said Fairbanks Banking [15] Company, a corporation, as an executive officer thereof and a member of its executive committee, under salary until July 1st, 1909, and also continued thereafter to act as director thereof as hereinbefore alleged.

(XVI)

The defendant B. R. Dusenbury, although not a member of the Board of Directors of said Fairbanks Banking Company, a corporation was, at the first meeting of the Board of Directors thereof, chosen and elected assistant cashier, and secretary and treasurer thereof, and said B. R. Dusenbury thereupon accepted said offices and entered upon the duties thereof, and thereafter said defendant B. R. Dusenbury continued to act as such assistant cashier, secretary and treasurer, and to assist in managing and conducting the affairs and business of said Fairbanks Banking Company, a corporation, as an executive officer thereof and a member of its executive committee, until May 12th, 1909. On said May 12th, 1909, said defendant B. R. Dusenbury was duly elected first vice-president of said Fairbanks Banking Company, a corporation, the duties of which he thereupon assumed, and he thereafter continued to be such vice-president and to assist in managing and conducting the affairs and business of said Fairbanks Banking Company, a corporation, as an executive officer and member of its executive committee, until October 12th, 1909.

(XVII)

Said defendant L. N. Jesson, although not a member of the Board of Directors of said Fairbanks Banking Company, a corporation, was on the 12th day of September, 1908, duly chosen and elected second vice-president thereof, and said defendant L. N. Jesson thereupon accepted said office and entered upon the duties thereof, and thereafter said defend-

ant L. N. Jesson continued to act as such second vice-president, and continued to assist in managing and conducting the affairs and business of said Fairbanks Banking Company, a corporation, as an executive [16] officer thereof, and as a member of the executive committee thereof, until the 12th day of September, 1910.

(XVIII)

Said defendant, R. C. Wood, although not originally a director of said Fairbanks Banking Company, a corporation, was, at the first meeting of the Board of Directors thereof, duly chosen and elected cashier thereof, and the said R. C. Wood thereupon accepted said office and entered upon the duties thereof, and acted and performed the duties of cashier of said Fairbanks Banking Company, a corporation, until June 29th, 1908, and was also afterward director and manager of said Fairbanks Banking Company, a corporation, as hereinbefore and hereinafter alleged. [17]

XIX.

Shortly after said corporation, the Fairbanks Banking Company, commenced business said corporation wrongfully and unlawfully began to reduce its issued capital stock by accepting the surrender thereof and giving in return therefor either cash or the stock subscription notes given for said stock, a list of which stock so surrendered, together with the date of surrender, the number of shares surrendered, the name of the party surrendering, and the amount of cash or the subscription notes returned therefor, is as follows, to wit:

Date	Number of shares	Party	Amount
1908.			
Jun. 30	130	R. C. Wood	\$13,000.00
Jul. 15	1	P. B. Walsh	100.00
Jul. 20	10	Thomas, E.	1,000.00
Jul. 20	20	McBride, A.	2,000.00
Jul. 20	2	Letnes, Anton	200.00
Jul. 20	10	A. N. Larson,	1,000.00
Jul. 20	2	F. E. Johnson	200.00
Jul. 20	2	J. L. Tobin	200.00
Jul. 20	5	Harry Cribb	500.00
Jul. 20	2	S. Hall Young,	200.00
Jul. 20	5	A. J. Nordale	500.00
Jul. 20	10	Barrett-Sickenger	1,000.00
Jul. 23	5	E. A. Suter	500.
Jul. 29	10	S. R. Weiss	1,000.
Aug. 5	20	Osmund Olson	2,000.
Aug. 6	5	A. J. Williams	500.
Aug. 8	10	R. R. Myers	1,000.
Aug. 12	5	D. Courtemanche	500.
Aug. 14	10	E. M. Keys	1,000.
Sep. 18	10	Oscar Goetz	1,000.
Sep. 18	5	G. A. Vedin	500.
Oct. 24	2	McDonnell	200.
Nov. 19	10	B. E. Johnson	1,000.
Nov. 19	100	Strandberg Bros.,	10,000.
Nov. 25	10	Strandberg Emma	1,000.
Dec. 12	2	F. E. Johnson	200.00
1909.			
Feb. 9	2	John Clifford	200.
Feb. 19	5	Geo. Jestel	500.

Date	Number of shares	Party	Amount
Jun. 10	10	Hart & McConnell	1,000.
Sep. 21	5	Lewis Enstrom	500.
Sep. 21	5	Oscar Enstrom	500.
Oct. 28	10	H. B. Parkin	1,000.
Oct. 28	1	Alex Cameron	100.
Oct. 28	2	Edith MacCormack	200.
Oct. 28	2	J. W. MacCormack	200.
Nov. 10	5	Francis H. Taylor	500.
Nov. 23	5	McGowan & Clark	500.
1910.			
Jan. 18	5	Horton & Dunham	500.
Oct. 25	100	John L. McGinn	10,000.
			<hr/>
			\$56,000.00
			<hr/>

[18]

That during all of the time from and including said June 30th, 1908, to and including said October 25th, 1910, the liabilities of said corporation to its general creditors, greatly exceeded its assets and by accepting the surrender of its capital stock and returning therefor cash or subscription notes, as aforesaid, the assets of said corporation to which said creditors could look for payment of their claims were further decreased, and the same were, in the manner and amounts aforesaid, withdrawn and divided among said stockholders of said corporation; that the surrender of said stock and the return of said cash and notes as above set forth, were made to and by said corporation with full knowledge, consent and approval of the defendants and each of them who

constituted its Board of Directors and officers on the dates aforesaid, or by the exercise of ordinary care the same could have been known to them and each of them; that the terms of office of the defendants herein as officers and directors of said Fairbanks Banking Company, a corporation, were as follows:

D. H. Jonas	Director	Mar. 12, 1908	to Jan. 4, 1911
J. A. Jesson	"	"	"
C. E. Claypool	"	"	Nov. 13, 1909
Hans Stark	"	"	Aug. 12, 1908
John Flygar	"	"	Sep. 2, 1910
C. J. Robinson	"	"	"
John P. Anderson	"	"	Mar. 13, 1909
M. H. McMullen	"	"	Sep. 12, 1908
Dan Ryan	"	"	Nov. 13, 1909
David Yarnell	"	"	Sep. 12, 1910
Robert Sheppard	"	"	"
E. R. Peoples	"	Sep. 12, 1908	Sep. 13, 1909
Ray Brumbaugh	"	Mar. 13, 1909	Sep. 12, 1910
John L. McGinn	"	Sep. 13, 1909	May 12, 1910
R. C. Wood	"	Nov. 13, 1909	"
J. A. Jackson,	"	"	Jan. 4, 1911
John A. Clark	"	May 12, 1910	"
J. A. Healey	"	Jun. 11, 1910	"
George Preston	"	Sep. 12, 1910	"
James W. Hill	"	Sep. 12, 1908	Sep. 12, 1910
John L. McGinn	Attorney	Feb. 12, 1908	May 12, 1910
L. N. Jesson, Second Vice-President and Executive Committeeman		Sep. 12, 1908	Sep. 12, 1910
James W. Hill, Vice-President and Executive Committeeman		Mar. 12, 1908	Jul. 1, 1909
R. C. Wood, Cashier		"	Jun. 30, 1908
R. C. Wood, General Mngr.		Sep. 13, 1909	May 12, 1910
B. R. Dusenbury, Assistant Cashier and Secretary-Treasurer.		Mar. 12, 1908	May 12, 1909
B. R. Dusenbury, Vice-President and Executive Committeeman,		May 12, 1909	Oct. 12, 1909
John L. McGinn, Vice-President,		Oct. 12, 1909	May 12, 1910

(XX)

In addition to the 2022 shares of capital stock in said corporation, the Fairbanks Banking Company, issued on March 14th, 1908, there was afterward issued to various persons in exchange for cash, notes or other considerations, one hundred and thirty-four shares and no more, but by reason of the surrender and cancellation of the shares as mentioned in the preceding paragraph hereof, the total issued capital stock never exceeded 2156 shares, and after November 9th, 1909, never exceeded 1726 shares. [20]

XXI.

In addition to the 520 shares of the capital stock in said Fairbanks Banking Company, a corporation, issued and delivered to said Barnette, Hill and Wood, the said Barnette, Hill and Wood did, after the 16th day of March, 1908, compute or cause to be computed to March 15th, 1908, all accrued interest on the loans and discounts of the Fairbanks Banking Company, a copartnership, which, in accordance with "Exhibit One" attached to the complaint, herein, were turned over to said Fairbanks Banking Company, a corporation. That prior thereto, to wit, on March 12th, 1908, the Board of Directors of said Fairbanks Banking Company, a corporation, authorized and directed that interest on said notes and discounts be computed to said March 15th, 1908, the same to be payable on or before December 31st, 1908, and that the amount of such accrued interest be placed to the credit of the Fairbanks Banking Company, a copartnership, all of which was done with the knowledge, consent and approval of the defendants D. H. Jonas, J. A. Jesson, C. E. Claypool, Hans Stark, John Flygar,

C. J. Robinson, John P. Anderson, M. H. McMullen, Dan Ryan, and David Yarnall, directors as aforesaid, and of the said R. C. Wood its cashier, John L. McGinn its attorney and legal advisor, James W. Hill, its vice-president, and B. R. Dusenbury its assistant cashier, secretary-treasurer. That pursuant to said authorization and direction, on March 23d, 1908, the interest account of said Fairbanks Banking Company, a corporation, was charged with the amount of \$39,642.81 as such accrued interest, and the same credited on the books of said corporation to an account known and styled "Old Bank Interest Account" That afterward, on August 5th, 1908, with the express knowledge, consent and approval of the defendants D. H. Jonas, James W. Hill, B. R. Dusenbury and Hans Stark, acting as members of the executive committee of said Fairbanks Banking Company, a corporation, there was issued to the said R. C. Wood a certain certificate of deposit, due December 31st, 1908, in the sum of \$10,000.00, as an advancement, on account of such accrued interest. That afterward, to wit, on November 9th, 1908, the said James W. Hill, with the express knowledge, [21] consent and approval of the defendants D. H. Jonas, Dan Ryan, James W. Hill, B. R. Dusenbury and L. N. Jesson as members of said executive committee, was authorized to withdraw \$5,000.00 as an advancement on account of said accrued interest. That afterward, to wit, on December 31st, 1908, there was placed on the books of said corporation to the credit of said E. T. Barnette \$19,741.79, and to the credit of said James W. Hill and R. C. Wood, each \$9870.90, making a total of \$39,473.69 as such accrued interest,

and the same was paid to each of said parties. That said interest was so computed and paid by said corporation out of its funds and without reference to whether or not the same had been collected from the makers of said notes. That as to not less than \$53-287.49 of said notes, said interest had not in fact been paid by said makers thereof, and the same was then and ever since said December 31st, 1908, has been due and unpaid and uncollectible, a list of which said notes is set out in paragraph IX of the complaint as amended. That plaintiff has no means of knowing the rate at which such accrued interest was figured, but alleges that the same is within the knowledge of said defendants. Plaintiff further alleges that on said December 31st, 1908, the defendants D. H. Jonas, J. A. Jesson, C. E. Claypool, John Flygar, C. J. Robinson, John P. Anderson, Dan Ryan, David Yarnall, Robert Sheppard, E. R. Peoples and James W. Hill, were members of the Board of Directors of said Fairbanks Banking Company, a corporation, and the defendant John L. McGinn was its attorney and legal advisor, the defendant L. N. Jesson, its second vice-president and a member of its executive committee, the defendant James W. Hill, its vice-president and a member of its executive committee, and the defendant B. R. Dusenbury its assistant cashier and secretary-treasurer, and said payment was made with the knowledge, consent and approval of each of said defendants, or by the exercise of ordinary care could have been known to them and each of them. That said interest was so allowed and paid without any consideration therefor. [22]

(XXII)

On and for a long time prior to the 12th day of May, 1909, there were engaged in business at the city of Fairbanks, other than the said Fairbanks Banking Company, a corporation, two banks, the First National Bank, a corporation organized under the laws of the United States, and the Washington-Alaska Bank, a corporation organized under the laws of the State of Washington. (Said latter-named corporation will hereinafter be called the Washington-Alaska Bank of Washington, to distinguish it from the Washington-Alaska Bank, of which plaintiff is receiver). On or about May 12th, 1909, the said Fairbanks Banking Company, a corporation, acting through its president, E. T. Barnette, and with the knowledge, consent and approval of its Board of Directors, and other officers, entered into an agreement with the Washington-Alaska Bank of Washington, in and by which said Fairbanks Banking Company, a corporation, and said Washington-Alaska Bank of Washington, agreed to, and they did, on or about said May 12th, 1909, purchase and acquire one-half each, the entire capital stock of said First National Bank. The capital stock of said First National Bank was then Fifty Thousand Dollars, and it had, or claimed to have, a surplus of Fifty Thousand Dollars. Said Fairbanks Banking Company, a corporation, and said Washington-Alaska Bank, of Washington, paid for the entire capital stock of the said First National Bank the sum of \$62,500.00 each, or a total sum of \$125,000.00. That at the time said capital stock was so purchased, the

said First National Bank was engaged actively in the banking business in Fairbanks, Alaska, and ever since has been and now is so engaged. [23]

XXIII.

On or about September 13th, 1909, the said Fairbanks Banking Company, a corporation, acting through its president, E. T. Barnette, with the express knowledge, consent and approval of the defendants D. H. Jonas, J. A. Jesson, C. E. Claypool, John Flygar, C. J. Robinson, Dan Ryan, David Yarnell, Robert Sheppard, E. R. Peoples, Ray Brumbaugh, John L. McGinn and James W. Hill, constitution its Board of Directors, and of said L. N. Jesson, its second vice-president and a member of its executive committee, and the said B. R. Dusenbury, its vice-president and also a member of its executive committee, purchased of and from W. H. Parsons, Falcon Joslyn, John Schram and others, the entire capital stock of the Washington-Alaska Bank of Washington, and paid therefor the sum of \$250,000.00 of the money and assets of the Fairbanks Banking Company, a corporation. On the date of said purchase, the said Washington-Alaska Bank of Washington had an issued capital stock of \$150,000.00, and claimed to have, or apparently had according to its books, a net surplus and undivided profit of \$66,839.16, and no more. On said September 13th, 1909, the said Washington-Alaska Bank of Washington had in its apparent assets, however, the sum of \$70,040.10 of loans past due, and which were and still are without substantial value, and was carrying its real estate and fixtures at \$10,000.00 in

excess of their real value. Said Fairbanks Banking Company, a corporation, with the express knowledge, consent and approval of the defendants aforesaid, its then directors and officers, as aforesaid, on said September 13th, 1909, paid to the stockholders of the Washington-Alaska Bank of Washington for said capital stock thereof a premium or bonus of more than \$100,000.00 over and above the then paid-in capital stock of said Washington-Alaska Bank of Washington, and over and above the actual value thereof, and thereby wrongfully and fraudulently lost and dissipated more than \$100,000.00 of the funds and assets of the said Fairbanks Banking Company, a corporation, and greatly aggravated and increased its already insolvent condition. [24]

(XXIV)

Upon and after the purchase and acquisition by the Fairbanks Banking Company, a corporation, of the said capital stock of said Washington-Alaska Bank of Washington, the said Fairbanks Banking Company, a corporation, acting through its Board of Directors, and by and with the knowledge, consent and approval of the defendant L. N. Jesson, its second vice-president, selected and appointed the defendant R. C. Wood, who was then cashier of the First National Bank, manager of the three banks, the Fairbanks Banking Company, a corporation, the Washington-Alaska Bank of Washington, and the First National Bank, and said three banks continued thereafter until on or about the 12th day of May, 1910, to be managed and operated by the defendant R. C. Wood, as manager, but ostensibly as separate and distinct and unassociated banks. [25]

(XXV)

On April 10th, 1910, the said Fairbanks Banking Company, a corporation, being then and there the owner and in control and management of the Washington-Alaska Bank of Washington, caused said Washington-Alaska Bank of Washington to declare and pay to the Fairbanks Banking Company, a corporation, as the owner of the entire capital stock of the said Washington-Alaska Bank of Washington, a dividend of thirty-three and one-third per cent on the capital stock of said Washington-Alaska Bank of Washington, amounting to the sum of \$50,000.00. At the time said dividend was so declared and paid, the entire capital stock of the Washington-Alaska Bank of Washington had been owned by said Fairbanks Banking Company, a corporation, and said Washington-Alaska Bank of Washington had been with the said Fairbanks Banking Company, a corporation, and said First National Bank, under the joint management of the defendant R. C. Wood, for the period of seven months, and during said seven months the net amount of surplus undivided profits and earnings, as shown by the books of said Washington-Alaska Bank of Washington, had decreased from \$66,839.16 to \$67,169.76, or a net loss of \$9,669.40 for seven months' operations. On the day said dividend was so declared and paid to said Fairbanks Banking Company, a corporation, by said Washington-Alaska Bank of Washington, the said Washington-Alaska Bank of Washington had a capital stock of \$150,000.00, and an alleged and apparent surplus (as shown by the books) of \$57,169.76, but on said date it had among its assets, loans and dis-

counts past due without substantial value, and which have not yet been paid and cannot be collected, amounting to \$76,005.35, and had invested in a certificate of deposit of its insolvent owner, the Fairbanks Banking Company, a corporation, the sum of \$125,000.00.

(XXVI)

On said 12th day of April, 1910, said Fairbanks Banking Company, a corporation, acting by its then Board of Directors, [26] ordered and directed said \$50,000.00 received as dividend from said Washington-Alaska Bank of Washington, to be disposed of by crediting \$25,000.00 thereof to the stock account, thus reducing the amount at which the entire capital stock of the Washington-Alaska Bank of Washington was carried on the books of the Fairbanks Banking Company, a corporation, to \$225,000.00, and the other \$25,000.00 of said dividend was ordered added to the alleged earnings or net profits on hand of the said Fairbanks Banking Company, a corporation. Thereupon, on said 12th day of April, 1910, said Fairbanks Banking Company, a corporation, acting by its then Board of Directors, by a resolution entered on the minutes of the said Fairbanks Banking Company, a corporation, wrongfully and fraudulently declared and ordered to be paid on its then outstanding capital stock of \$168,600.00 a dividend of twenty per cent, amounting to \$33,720.00, which said dividend was thereupon actually paid to the then stockholders of the said Fairbanks Banking Company, a corporation. [27]

XXVII.

On said 12th day of April, 1910, at and before the

time when the same was ordered to be paid, the said Fairbanks Banking Company, a corporation, was, and long prior thereto had been in a grossly insolvent and failing condition. After adding to the apparent surplus, undivided profits and earnings then on hand the sum of \$25,000.00 of the dividend received from the Washington-Alaska Bank, of Washington, said Fairbanks Banking Company, a corporation, had on hand in apparent surplus, undivided profits and earnings the sum of \$32,749.82, while the dividend declared and paid amounted to \$33,720.00. Said Fairbanks Banking Company, a corporation, had in fact on said date no earnings, surplus or undivided profits on hand out of which said dividend could legally be paid, but on the contrary had at and prior to said date neither capital nor surplus in this; said Fairbanks Banking Company, a corporation, had on said date an issued capital stock of \$168,600.00. It was carrying as an asset on its books \$75,000.00 as a premium on the capital stock of its subsidiary corporation, the Washington-Alaska Bank of Washington, which said asset had no existence whatever and was purely imaginary and of no value; said Fairbanks Banking Company, a corporation, further had on said April 12th, 1910, carried as an asset at their face value, loans and discounts which were past due, were worthless, and have not yet been paid, and cannot be collected, amounting to \$118,250.47, and was also still carrying on its books as an asset of \$341,949.00 the capital stock of said Gold Bar Lumber Company, which originally had been and still was fraudulently over-valued by a sum in excess of \$93,881.11. That said dividend

amounting to the sum of \$33,720.00 was wrongfully, unlawfully and fraudulently declared and paid by said Fairbanks Banking Company, a corporation, with the express knowledge, consent and approval of the defendants D. H. Jonas, J. A. Jesson, John Flygar, C. J. Robinson, David Yarnell, Robert Sheppard, Ray Brumbaugh, John L. McGinn, R. C. Wood, J. A. Jackson and James W. Hill, constitution its said Board of Directors, and of the defendant L. N. Jesson, its second vice-president and a member of its executive committee, and R. C. Wood, its general manager, out of, by and with the funds and money of the depositors of said Fairbanks Banking Company, a corporation, and not by, out of or with the surplus, earnings, undivided profits of the said Fairbanks Banking Company, a corporation. That on said date of April 12th, 1910, the said Fairbanks Banking Company, a corporation, owed to depositors the sum of \$960,689.79. [28]

(XXVIII)

In the month of May, 1910, and shortly prior to the 12th day of May, 1910, the said E. T. Barnette, as president of the Fairbanks Banking Company, a corporation, and of the Washington-Alaska Bank of Washington, by and with the knowledge and consent of the then directors and officers of the said Fairbanks Banking Company, a corporation, wrongfully sold and transferred to the defendants R. C. Wood and John L. McGinn, the entire stock of the said First National Bank, for the *same* sum of \$125,000.00 which the said Fairbanks Banking Company, a corporation, and the said Washington-Alaska Bank, of Washington, had paid therefor on or [29] about

May 12th, 1909. That said sale and said transfer of said stock in said First National Bank to the defendants R. C. Wood and John L. McGinn, was claimed to have been made under and pursuant to an option claimed to have been given to the defendant Wood at the time said stock was purchased by said Fairbanks Banking Company, a corporation, and the said Washington-Alaska Bank of Washington, but said option, if it ever in fact existed as claimed, was entered into without consideration, and was void. Said entire capital stock in said First National Bank was carried by said Fairbanks Banking Company, a corporation, for an entire year without any interest or profit paid to or received by said Fairbanks Banking Company, a corporation, and solely for the use, benefit and profit of said defendants R. C. Wood and John L. McGinn, all of which was done, suffered and permitted by and with the knowledge, consent and approval of all of the then directors and officers of the said Fairbanks Banking Company, a corporation, by which act alone the said Fairbanks Banking Company, a corporation, was damaged in a large sum of money, to wit, in a sum in excess of Twenty-five Thousand Dollars.

(XXIX)

Immediately, or very shortly after the said John L. McGinn and the said R. C. Wood so purchased and acquired said stock in said First National Bank, and on May 12th, 1910, said R. C. Wood resigned as, and ceased to be a director of said Fairbanks Banking Company, a corporation, and said John L. McGinn resigned as and ceased to be a director and vice-president of said Fairbanks Banking Company, a

corporation. At the time and long prior to their said resignations, the said R. C. Wood and John L. McGinn had full and complete knowledge and means of knowledge of the grossly insolvent and failing condition of the said Fairbanks Banking Company, a corporation, and they furthermore knew that the said E. T. Barnette had at that time not yet withdrawn his alleged special deposit of \$200,000.00, and the said R. C. Wood and [29a] John L. McGinn then and there knew that said E. T. Barnette was likewise aware of the said insolvent and failing condition of the said Fairbanks Banking Company, a corporation, and they, the defendants Wood and McGinn, also knew that said E. T. Barnette could and would shortly withdraw in cash the whole of said alleged special deposit of \$200,000.00, and which said E. T. Barnette actually did withdraw within sixty days after May 12th, 1910, thereby preferring himself to the extent of \$200,000.00 as an alleged creditor of said insolvent Fairbanks Banking Company, a corporation, all of which was done with the knowledge, consent and approval of the then Directors and officers of the said Fairbanks Banking Company, a corporation.

(XXX)

On the first day of October, 1910, the said Fairbanks Banking Company, a corporation, acting through its then Board of Directors, caused the Washington-Alaska Bank of Washington to be consolidated with the Fairbanks Banking Company, a corporation, by having and causing the said Washington-Alaska Bank of Washington to turn over, deliver and transfer to the said Fairbanks Banking

Company, a corporation, all of its assets, and the said Fairbanks Banking Company, a corporation, thereupon assumed all of the liabilities of said Washington-Alaska Bank of Washington, including amounts due to depositors amounting to \$947,800.29. Although said Washington-Alaska Bank of Washington had apparent undivided profits of \$4658.92 on and prior to the time of said consolidation, said Washington-Alaska Bank of Washington on said date had no undivided profits on hand, but in fact its capital stock of \$150,000.00 was seriously impaired in this: On said first day of October, 1910, said Washington-Alaska Bank of Washington had loans and discounts carried at their face value of \$100,704.98, which were then and there past due, and were and still are bad, worthless and uncollectible, and have not yet been paid, all of which was then and there known to the then directors and officers of said Fairbanks [29b] Banking Company, a corporation, or by the exercise of ordinary care might have been known. After said consolidation, said Fairbanks Banking Company, a corporation, continued to carry on and conduct a banking business at said city of Fairbanks as formerly, but under the name of Washington-Alaska Bank, and said Washington-Alaska Bank and its then Board of Directors at all times after October 1st, 1910, wrongfully, fraudulently and without right, carried on the books of said Washington-Alaska Bank as a book asset the item "Premium Washington-Alaska Bank Stock, \$75,000.00," which said asset had no existence whatever, but in fact was purely imaginary, false and fictitious.

(XXXI)

Although said Fairbanks Banking Company, a corporation, was at all times insolvent and in a failing condition, as herein alleged, said Fairbanks Banking Company, a corporation, (but under the name of the Washington-Alaska Bank after the first day of October, 1910), continued actively in business as a bank, and received deposits from the public generally until and including January 4th, 1911, and thereafter on January 5th, 1911, in a certain suit entitled "Tanana Valley Railroad Company, a corporation, and John Zug, plaintiffs, vs. Washington-Alaska Bank, a corporation, defendant," commenced in said district court, Territory of Alaska, fourth division, an order was duly given and made appointing F. W. Hawkins receiver of said Washington-Alaska Bank, who thereupon duly qualified and entered upon his duties as such receiver. Thereafter, on the 6th day of January, 1911, said District Court by an order duly given and made appointed E. H. Mack jointly with said Hawkins, receiver of said Washington-Alaska Bank, and said Mack thereupon duly qualified and entered upon his duties as such receiver; and thereafter said Hawkins and Mack continued to be and act as receivers of said Washington-Alaska Bank until the 12th day of May, 1911, when said Hawkins and Mack resigned as such receivers, and thereupon on said date last named said District Court, by an order duly given and made and entered, [29c] appointed the plaintiff, F. G. Noyes, receiver of said Washington-Alaska Bank, and said F. G. Noyes thereupon duly qualified as such receiver, and ever since has been, and now

is the duly qualified and acting receiver of the said Washington-Alaska Bank, and as such is plaintiff in this suit.

(XXXII)

On the date and at the time said Washington-Alaska Bank ceased business, on January 4th, 1911, said Washington-Alaska Bank had liabilities in excess of \$1,037,296.13, consisting of amounts due to depositors, other than banks, \$921,357.56, and amounts due to banks in excess of \$115,938.77, and the assets of said Washington-Alaska Bank were, and still are, by reason of the wrongful, fraudulent and negligent acts of the defendants herein alleged, insufficient to pay said liabilities in full.

(XXXIII)

The receivers of said Washington-Alaska Bank have collected and reduced to cash as far as possible the assets of said Washington-Alaska Bank, and there has been declared and paid upon the acknowledged or proven liabilities of said bank, dividends aggregating fifty per cent, save and except that \$12,627.70 of said dividends have either not been called for, or have been withheld by order of court, and save also that the Dexter Horton National Bank of Seattle, to whom is due the sum of \$128,899.37, and other creditors to the amount of \$4,132.63 have not proven their claims, or yet demanded their dividends.

(XXXIV)

At the time said Washington-Alaska Bank ceased business on January 4th, 1911, there was due and owing from said Washington-Alaska Bank, to the said Dexter Horton National Bank of Seattle, the

sum of \$128,899.37, and the said Dexter Horton National Bank had in its possession all of the said capital stock of the said Gold Bar Lumber Company, so belonging to said Washington-Alaska Bank as hereinbefore alleged, and said Dexter Horton National Bank claimed to hold said stock in said Gold Bar Lumber Company as collateral security to secure the payment to said Dexter Horton National [29d] Bank of said sum of \$128,899.37, and said Dexter-Horton National Bank still has possession of said stock in said Gold Bar Lumber Company, and still so claims to hold the same as such collateral security.

(XXXV)

From the time of the organization of said Fairbanks Banking Company, a corporation, at all times the sum of \$341,949.00 of the assets of said Fairbanks Banking Company, a corporation, have been invested in the said stock of the said Gold Bar Lumber Company, and said stock constituted a book asset of that amount when said Washington-Alaska Bank ceased business, and is still subject to the claims made by said Dexter-Horton National Bank of Seattle, an asset of said Washington-Alaska Bank. Said F. G. Noyes, as receiver of the said Washington-Alaska Bank, plaintiff, owing to the fact that said stock in said Gold Bar Lumber Company is so held and claimed by said Dexter-Horton National Bank, has been and now is unable to sell or dispose of the same, and although he has made diligent attempt has been unable to obtain for said stock in said Gold Bar Lumber Company any offer in excess of the claim of said Dexter-Horton National Bank, or any offer whatsoever; and plaintiff alleges that if said stock in

said Gold Bar Lumber Company, so belonging to said Washington-Alaska Bank, has any value in excess of the claim of said Dexter-Horton National Bank, it is of a wholly uncertain and speculative character.

(XXXVI)

The only remaining assets of said Washington-Alaska Bank in said receiver's hands, out of which any further dividends to depositors and other creditors can be paid, are bills, and notes and overdrafts due from various persons and corporations, of the face value of \$266,020.31; real estate and furniture and fixtures carried on the books of said corporation at \$40,726.13; stock in the Chena Milling, Smelting & Refining Company of the par value of \$1000.00, and a claim against the Scandinavian-American Bank of Seattle for \$17,886.05, in litigation. That said bills, notes and [29e] overdrafts, although of the face value of \$266,020.31, are not of that value. The whole amount thereof are past due, and not to exceed \$80,000.00 thereof are owing from solvent debtors or can be collected, and the remainder thereof are bad, worthless and uncollectible. Said real estate, furniture and fixtures are not of the actual cash or market value of more than \$20,000.00, and said stock in said Chena Milling, Smelting & Refining Company has no actual or market value.

(XXXVII)

Plaintiff therefore does hereby allege that at the time said Washington-Alaska Bank ceased business, on January 4th, 1911, the assets of said Washington-Alaska Bank were, and they still are, by reason of the wrongful, fraudulent and negligent acts and conduct of the defendants herein alleged, insufficient in

amount to pay the debts and liabilities thereof, in full, and that the sum which will be required in addition to said assets, in order to pay said liabilities in full, will and does amount to more than Four Hundred Thousand Dollars.

(XXXVIII)

The said wrongful, unlawful and fraudulent and negligent acts and conduct of the defendants, while directors and officers of said Washington-Alaska Bank (formerly Fairbanks Banking Company), as hereinbefore alleged, are and were the sole and proximate causes of the said assets of said Washington-Alaska Bank being so insufficient, as aforesaid, to pay its liabilities in full, and by reason of said wrongful, unlawful and fraudulent and negligent acts and conduct of said defendants, while directors and officers of said Washington-Alaska Bank (formerly Fairbanks Banking Company), said Washington-Alaska Bank suffered loss and damage in excess of the sum of Four Hundred Thousand Dollars, the exact amount of which cannot be determined except by an accounting to be had in a court of equity.

(XXXIX)

On account of the various terms of office of said defendant, as directors and officers of said Washington-Alaska Bank not being [29f] identical, but beginning and ending at many and divers different dates, it would, if plaintiff herein should pursue any remedy at law he might have in the premises, cause a multicPLICITY of suits and actions, and cause large and useless expense, and furthermore, the trial and examination into the matters and things herein

alleged will involve the examination into many complicated accounts, which can only properly be done in a court of equity. Therefore plaintiff alleges that he has in the premises no plain, speedy or adequate remedy at law, and therefore invokes the aid of a court of equity, wherein only matters of this kind are properly cognizable and relievable.

WHEREFORE, plaintiff prays for judgment of this Court, that an accounting be had and taken by this Court, or by a master or referee, appointed by this Court and under its supervision, to determine the amount due to plaintiff for the wrongful, fraudulent and negligent acts and conduct of the defendants as directors and officers of said Washington-Alaska Bank (formerly Fairbanks Banking Company) herein alleged, and that plaintiff have judgment entered against defendants, and each of them, for the amount found due from them respectively upon such accounting.

PLAINTIFF ALSO PRAYS for all other and further relief to which he may be in equity entitled, including costs.

O. L. RIDER,

Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

F. G. Noyes, being first duly sworn deposes and says: I am the plaintiff named in the foregoing amendment to complaint; I have read said amendments to complaint, know the contents thereof, and believe the same to be true.

F. G. NOYES.

Subscribed and sworn to before me this 23d day of May, A. D. 1913.

[Notarial Seal]

L. D. BENNETT

Notary Public in and for the Territory of Alaska,
Residing at Fairbanks. [29g]

Due and legal service of copy of the foregoing amendments to complaint is hereby accepted for the defendants J. A. Jesson, George Preston, E. R. Peoples, John A. Clark, Ray Brumbaugh and James W. Hill, this — day of May, 1913.

McGOWAN & CLARK,

Attorney for Said Defendants.

Due and legal service of copy of the foregoing amendments to complaint is hereby accepted for the defendants R. C. Wood, J. A. Healey and John L. McGinn, this 23d day of May, 1913.

A. R. HEILIG,

Attorney for Said Defendants. [29h]

Exhibit One.

AGREEMENT AND ASSIGNMENT BETWEEN
J. W. HILL, E. T. BARNETTE AND R. C.
WOOD TO AND WITH THE FAIRBANKS
BANKING COMPANY. [29i]

AGREEMENT.

This Indenture, made and entered into this 16th day of March, 1908, by and between E. T. Barnette, James W. Hill and R. C. Wood, co-partners doing business under the firm name and style of the Fairbanks Banking Company of Fairbanks, Alaska, the parties of the first part, and the Fairbanks Banking Company, a corporation organized, created and exist-

ing under and by virtue of the laws of the state of Nevada, party of the second part,

WITNESSETH: That, whereas, the parties of the first part as co-partners since the month of May, 1905, have been engaged in carrying on and conducting a general banking business in the town of Fairbanks, Alaska, under the name and style of the Fairbanks Banking Company, and is possessed at this time as a part of the property and business of said co-partnership—

(a) Stock in the following corporations, namely:—

1. Four-fifths of the entire stock of the Gold Bar Lumber Company, a corporation organized, created and existing under and by virtue of the laws of the State of Washington. The certificates of which were issued August the 14th, 1906 as follows:—Certificate No. 11 to R. C. Wood, 24 shares; Certificate No. 12 E. T. Barnette, 48 shares; Certificate No. 13 James W. Hill, 24 shares. Said Certificates of Stock now being in the possession of the Scandinavian-American Bank of Seattle, Washington and enjoined by Seattle Court from delivering. Said stock being of the value of \$341,949.00 as per statement hereto attached marked Exhibit “A.”
2. The entire stock of the Tanana Publishing Company a corporation organized and existing under and by virtue [29j] of the laws of the state of Washington. Said stock being of the agreed value of \$12,000.00

(b) of the following real estate:—

1. Bank building and lot of the agreed
value of\$19,423.58
2. Warehouse of agreed value of..... 3,360.00
3. Building and lot town of Cleary where
a branch bank is being conducted;
the agreed value of..... 1,695.50
4. Assay building and plant, agreed value
of 2,860.57

(c) Have outstanding loans and discounts of the value of 353,842.54.

All of which are evidenced by notes of the parties owing the same. A scheduled statement specifying the name of the debtor and the face of the note is hereto attached and marked Exhibit "B." Some of which said notes are secured by mortgages upon real or personal property; and

(d) Overdrafts as appear upon the books of the parties of the first part, of the agreed value of8,326.75
as per list attached marked Exhibit "C."

(e) Due from Banks as follows:—

Bank of B. N. A.....	2236.66
Dome City Bank.....	714.42
National Park Bank.....	790.61
Seattle National Bank.....	3951.00
Valdez Bank & Mercantile Co.	247.78
Dexter Horton & Co.....	1240.40.
Amounting to the sum of....	9,180.87

(f) Cash on hand amounting
to35,774.38

(g) Gold-dust of the value
of 2,737.49

(h) Sundry other credits of
the parties of the first
part to the agreed
value of 637.34

Making the total resources of
the Bank as agreed upon
by the parties hereto of
the value of..... 790,940.31

and,

Whereas, the liabilities of said parties of the first
part are as follows:

1. Script now in circulation..... 64,737.00
2. Deposits—Ordinary356,677.92
3. Deposits—Savings 63,238.22

[29k]

4. Due to Banks as follows:—

Alaska Bank & Safe Deposit Co.....	273.44
Ladd & Tilton.....	355.96
Corn Exchange National Bank.....	7659.38
First National Bank, San Francisco.....	7357.09
Scandinavian American Bank.....	12713.93
National Bank of Commerce.....	12.81
Cleary Branch	25919.56

Making a total liability.....538940.31

And,

Whereas, the party of the second part was incorpo-
rated for the express purpose of taking over all of
the property, real, personal and mixed of the parties
of the first part, their business and good will (save
and except the sum of \$200,000.00 the original capital
of the parties of the first part, the same being the

personal property of E. T. Barnette) to the valuation thereon placed, as heretofore set forth. And in consideration thereof was to assume and pay all the liabilities of the parties of the first part, as hereinbefore set forth; and

Whereas, E. T. Barnette of the parties of the first part has personally belonging to him of the assets of the parties of the first part the sum of \$200,000.00, being the amount of the capital stock of the parties of the first part contributed to said co-partnership by the said E. T. Barnette; and it has been agreed that said sum of \$200,000.00 shall be repaid by the party of the second part to the said E. T. Barnette one year from the release of the said Gold Bar Stock from the injunction now in force against it; and that said E. T. Barnette during said time shall leave said amount upon deposit without interest with the party of the second part, provided, however, that in the event the party of the second part shall sell said Gold Bar Stock for cash, then the said sum of \$200,000.00 immediately upon receipt of said cash by the party of the second part shall become immediately [291] due and payable; and in the event that said Gold Bar Stock is not sold for cash, but part for cash and part on time, then the said E. T. Barnette shall be entitled to receive such a proportion of said sum of \$200,000.00 as the cash paid upon the purchase price of said Gold Bar Stock shall bear to the entire purchase price, And,

Whereas, owing to a certain action now pending in the Superior Court of the State of Washington, for King County, entitled J. H. Causten, Plaintiff, vs.

E. T. Barnette, Defendant, in which said action the said Causten is seeking to be declared the owner of a certain part and portion of the capital stock of the Gold Bar Lumber Company issued in the name of E. T. Barnette, as heretofore set forth; and

Whereas, said litigation is now undetermined, and the right of the said Causten to any part or portion of said stock of the Gold Bar Lumber Company is undetermined, and it is the desire of the said E. T. Barnette, and the party of the second part, that the said E. T. Barnette shall indemnify the party of the second part for any loss that may be sustained by reason of any adverse decision in the value of the Gold Bar Stock; and said E. T. Barnette has heretofore agreed that the sum of \$200,000.00 before mentioned shall also be security to the party of the second part under the conditions and terms set forth on page three of this agreement, against any adverse decision of the Court in Causten vs. Barnette suit, as such decision may decrease the value of the Gold Bar property as accepted by the party of the second part; and

Whereas, the party of the second part has agreed with the parties of the first part to issue to them stock for the amount that the assets of said company shall exceed its liabilities less the sum of \$200,000.00, and the parties of the first part have agreed to accept the same, [29m—33]

Now, therefore, for the purpose of carrying out the terms and agreements between the parties hereto, as hereinbefore set forth, this Indenture,

Witnesseth: That the parties of the first part for

and in consideration of the foregoing and of other good and valuable consideration to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, do by these presents assign, transfer and set over unto the party of the second part, four-fifths of the entire stock of the Gold Bar Lumber Company, a corporation created and existing under and by virtue of the laws of the State of Washington, and agree to transfer and deliver to the party of the second part the Certificates of stock now owned by them as hereinbefore set forth as soon as they obtain possession of same; and do hereby assign, transfer and set over unto the party of the second part all of their right, title and interest in and to all and singular the property, real, personal and mixed of said Gold Bar Lumber Company situated at Gold Bar, Washington, or wheresoever situated according to the statements hereto attached.

And the said E. T. Barnette personally agrees to and with the party of the second part that he will save the party of the second part harmless as to any decrease in the value of said Gold Bar Lumber Company Stock on account of the litigation now pending in the Court of Seattle entitled Causten vs. Barnette, and that the sum of \$200,000.00 shall remain upon deposit with the Fairbanks Banking Company upon the terms and conditions heretofore set forth on page 3 of this agreement, and be security to said party of the second part against any adverse decision of the court in said suit which may decrease the value of the Gold Bar property as

accepted by the party of the second part.

The parties of the first part also hereby assign, transfer [34] and set over unto the party of the second part all of their stock in and to the Tanana Publishing Company, and the property that belongs to said corporation as heretofore agreed between the parties. It being understood that the stock of paper now in the possession of the parties of the first part shall remain and be their property.

The parties of the first part hereby assign, transfer and set over unto the party of the second part all their right, title and interest in and to the Bank Building and the lot upon which the same is situated, the warehouse situated thereon, the building and lot in the town of Cleary, and all the right, title and interest in and to the assay building and plant situated in Fairbanks, Alaska, and hereby agree that they will procure and execute the necessary deeds to transfer said real property. And the parties of the first part hereby agree that they will procure and execute the necessary deeds to transfer said real property. And the parties of the first part hereby assign, transfer and set over unto the party of the second part all and singular the personal property, fixtures, vault, safe deposit boxes, and stock in trade, apparatus and effects used in connection with the business of said bank, and the business and goodwill of the parties of the first part to the party of the second part, and to its assigns forever.

The parties of the first part hereby assign, transfer and set over unto the party of the second part

all of their outstanding loans and discounts as the same appear in the scheduled statement hereto attached marked Exhibit "A," and the notes of the debtors given to evidence the amount of such loans and discounts, together with all mortgages upon real or personal property that have been given to secure the same, and hereby agree that they will transfer to the party of the second part by proper indorsement all of said notes and mortgages and forthwith deliver the same into the [35] possession of the party of the second part.

Also all of the right, title and interest of the parties of the first part in and to all overdrafts as the same appear upon the list hereto attached marked Exhibit "C," and all moneys due and owing the parties of the first part from the Banks mentioned in page 2 of this agreement; and likewise hereby transfer, assign and set over to the party of the second part all cash on hand now belonging to the parties of the first part; all gold-dust in their possession as the same appears on page 2 of this agreement, and all the property of the parties of the first part, real, personal or mixed that has this day been turned over to the party of the second part, and of which the party of the second part is now in the possession of.

The intention of this agreement being to place the party of the second part in the shoes of the parties of the first part as to the Banking Business of the Fairbanks Banking Company and as to all properties heretofore mentioned or specified.

To have and to hold unto the party of the second

part, its successors and assigns, forever.

And the parties of the first part hereby authorize and empower the party of the second part, its successors and assigns, to perform all acts that may be necessary to protect and preserve the properties hereby assigned; and to bring all necessary actions at the cost of the party of the second part to enforce the collection thereof, or to protect the same.

And the said party of the second part in consideration of the foregoing hereby covenant and agree to and with the parties of the first part that it will in due course pay all the debts and discharge all the liabilities of the said parties of the first part as the same are specified on [36] pages 2 and 3 of this agreement, and will at all times hereafter effectually keep indemnified the parties of the first part their executors and administrators and their assets and effects against all such debts and liabilities and all actions, proceedings, costs and expenses in respect thereto, and all costs and expenses by reason of any action or proceeding which may be instituted or taken by said party of the second part by virtue of the power or authority hereinbefore contained, or of anything relating thereto.

The party of the second part agrees to pay to E. T. Barnette the sum of \$200,000.00 as hereinbefore on page three of this agreement specified, save and except, however, that if a decision adverse to the said E. T. Barnette shall be rendered in said cause of Causten vs. Barnette and by reason thereof the value of the Gold Bar Stock shall be depreciated by reason of Causten being declared the owner of a part or

portion thereof, then, the amount of such depreciation shall be deducted from said sum of Two Hundred Thousand Dollars.

The party of the second part hereby agrees that it will issue to the parties of the first part paid up stock to the amount they shall be entitled to under the terms of this agreement.

This agreement shall extend to and bind the heirs, executors, administrators, successors and assigns of the parties hereto.

In witness whereof the parties of the first part have hereunto set their hands and seals, and the party of the second part by resolution of its Board of Directors as hereunto by its President and Secretary set its corporate name and seal this the 16th day of March, 1908. [37]

E. T. BARNETTE. (Seal)

JAMES W. HILL. (Seal)

R. C. WOOD. (Seal)

FAIRBANKS BANKING COMPANY,

By E. T. BARNETTE,

President.

Signed, sealed and delivered in the presence of:

JOHN L. MCGINN.

H. F. YEAGER.

(Seal)

Attest: B. R. DUSENBURY,

Secretary.

United States of America,
Territory of Alaska,—ss.

This is to certify that on this the 16th day of March, 1908, personally appeared, E. T. Barnette, James W. Hill and R. C. Wood to me personally

known to be the individuals described in and whose signatures are subscribed to the foregoing instrument and they acknowledged to me individually and not one for the other that they signed, sealed and delivered the said instrument freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and seal this the day and year hereinabove written.

[Seal]

JOHN L. MCGINN,

Notary Public for Alaska. [38]

United States of America,
Territory of Alaska,—ss.

This is to certify that on this the 16th day of March, 1908, personally appeared before me E. T. Barnette and B. R. Dusenbury to me personally known and known to me to be the president and secretary, respectively of the Fairbanks Banking Company, the corporation named in the foregoing instrument as the party of the second part, and the said president executed the said instrument, and acknowledged to me that he signed, sealed and delivered the same by authority of the Board of Directors of said corporation, for the uses and purposes therein mentioned, and the secretary affixed the seal of said corporation thereto.

In witness whereof, I have hereunto set my hand and seal this the day and year hereinabove written.

[Seal]

JOHN L. MCGINN,

Notary Public for Alaska. [39]

EXHIBIT "B."

LOANS AND DISCOUNTS.

2020	Altman, Max.....	\$2500.00
1236	Anderson Brothers.....	1165.00
1657	Asheim, Sam.....	618.58
2095	Armstrong, et al.....	11468.90
2093	“ “	13785.80
2094	“ “	3931.01
1849	Atchison, John.....	650.00
1975	Barrett, William.....	16855.85
1225	“ “	16476.18
1435	Brazeau, Ben.....	400.00
1958	Balthuff & Sickinger.....	300.00
1334	Badger, H. M.....	194.00
1931	Boker, J. E.....	150.00
1523	Burke & Deal.....	100.00
1255	Barthel Brewing Co.....	14000.00
1642	“ “ “	3200.00
1587	Berger, D. H.....	550.00
1110	Balzimer & McRae.....	800.00
1991	Bechtol, John J.....	132.82
1795	Burnes, J. E. & Baird, J. F.....	47.00
1333	Badger, H. M.....	735.00
2036	Courtemanche, Dave.....	500.00
1239	Cribb, Harry.....	1200.00
1240	“ “	4000.00
2102	Cook & Co.....	13326.62
2110	City Warrant.....	40.00
2111	“ “	52.70

1613	Claypool, C. E.....	1744.90
1943	Cleary, Frank.....	500.00
1696	Charles, P. G.....	103.08
2053	Collins, John.....	300.00
2054	Craig, W. A.....	2200.00
2049	Campbell, E. C.....	200.00
1403	Clark et al.....	800.00
1495	“ “	250.00
1528	“ “	1000.00
2088	Cook, H.....	14392.90
2087	“ “	3074.49
2086	“ “	916.49
1786	Claypool, C. E.....	150.00
1888	Clum, John P.....	250.00
1699	Colbert, L. D.....	96.87
280	Casey & Saylor.....	40.00
1521	Charles & Bernard.....	200.00
1163	Cathcart, Edgar	410.00
2085	Cook, H.....	1965.50
645	Cloes, H. G.....	158.50
2116	City Warrant.....	387.50
2117	“ “	35.00
1393	Doring, H.....	609.52
1254	Draper, Charles.....	75.00
1259	Evans & Porter.....	171.35
1858	Fairburn, L. A.....	125.00
[40]		
1688	Fairburn et al.....	1700.00
1861	Fairburn “	300.00

1544	Frost, Jas.....	750.00
1733	Frost, Jas.....	100.00
1891	Fairbanks Commission House.....	33.95
1937	Floradora... ..	338.37
1530	Fairbanks Commission House....	2000.00
1469	“ “ “	212.50
1306	Gilcher, William.....	495.10
1994	Grant, H. G.....	7.70
1591	Gelling & Bechtolt.....	1050.00
1753	Gaustad, O. P. et al.....	175.00
2059	Green, V. O.....	50.00
1952	“ “	504.25
1939	“ “	250.00
1926	“ “	2332.34
2048	“ “	50.00
1855	Gardiner, H. E.....	2824.00
892	Gregg, Geo.....	59.30
1721	Green, W. F.....	1332.74
1854	Gallagher, Phil.....	150.00
1329	Guenther, O. J.....	202.00
1808	Hutchinson, Geo.....	300.00
1836	Hall, Frank.....	4000.00
1745	Hannum & Hamilton.....	1500.00
1155	Hudson, F. P.....	125.00
1853	Hall, F. H.....	75.00
1601	Howe, E. D.....	157.25
1274	“ “	150.00
1174	“ “	150.00
2005	Hilliard, J. J., Jonas, D. H.....	2000.00
2017	Heilig & Tozier.....	538.71

2055.	Houlihan, J. C.....	89.00
2006	Ingels, F. B.....	2000.00
1900	Johnson, A. J.....	200.00
1497	Johnson, Chas. et al.....	1000.00
1604	James, B. T. ".....	2000.00
2069	Jonas & Brown.....	2000.00
1921	Johnstone, J. I.....	450.00
1548	James, William.....	4301.00
2119	Jonas & Brown.....	300.00
2114	Johnson, John C.....	450.00
1635	Keevey et al.....	730.00
2022	Kellogg, Geo.....	625.00
1489	Karstens, H. P.....	100.00
1510	" ".....	100.00
1990	Lewis, L. T.....	160.00
1632	Larsen, Alex.....	797.71
552	Long et al.....	50.00
1616	Lindsay et al.....	200.00
1382	Longdon, W. C. et al.....	200.00
1911	Lund et al.....	100.00
648	Long et al.....	505.00
1846	Maltby, Alfred.....	88.75
1430	McPhee & Sheppard.....	7000.00
2113	McRae, D. D.....	50.00
2104	MacCormack, J. W., Agt.....	208.40
1683	Meehan & Kelly.....	450.00
2041	Moran, B. H.....	500.00
2073	McIlroy, S. D.....	250.00

1653	McDowell, J. E.....	200.00
2032	McInroy, Chas. A.....	344.18
2089	McGinn & Sullivan.....	3931.01
2090	“ “	28180.00
2057	McMullen, M. H.....	2000.00
1701	MacCormack, J. W.....	300.00
1844	“ “	45.00
1879	Markinson, et al.....	373.50
675	Morency, Al....	800.00
1907	McNeil, M.....	500.00
1421	McCauley, C. D.....	350.00
2016	McGowan, Thos.....	1000.00
1585	McNeer, A. H.....	1525.00
1988	Mac Arthur, M. A. J.....	2400.00
2076	Moe & Schroeder.....	230.00
2099	News Publishing Co.....	262.50
1837	Nelson & Peterson.....	10000.00
2027	News Publishing Co.....	509.75
2116	“ “ “	442.79
1946	Overgaard et al.....	275.00
1540	Propes W. H. et al.....	261.50
1731	Petree, Dave.....	5500.00
1957	“ “	2800.00
1356	Pres. Church.....	1050.00
774	Porter, W. H.....	2070.33
2003	Rose & Kellum.....	750.00
2115	Royal Hotel.....	120.00
1593	Rutherford & Widman.....	2500.00
1878	Rusk, E. M.....	250.00
1995	Roth et al.....	1500.00
2101	Roy, H. T.....	75.00
2091	Ridenour, J. C.....	11236.90

2092	“ “	1933.53
2097	Royal Hotel	180.00
656	Roberts et al.	50.00
2067	Red Cross Drug Store	3350.00
1376	Schaupp, Fred	4420.00
1606	“ “	438.00
2103	“ “	1245.81
1912	Slippery, J. A.	925.00
1525	Spencer et al.	1891.44
1260	Sullivan, M. L.	4500.00
2016	Smith, John C.	1000.00
1887	Sullivan, Jno. E. et al.	250.00
506	Sorensen, Bros.	450.00
1996	Str. White Seal	43.69
1940	St. George, H. E.	400.00
1984	Smith, Jos. H.	2000.00
1947	“ “	3000.00
2064	Shepherd, Robt.	5056.57
1692	Scott & Spencer	2000.00
1067	Sullivan, M. J.	300.00
1311	Stein, Abe	700.00
1304	Sorensen, Rufus	2824.00
2074	Shinkle, W. A.	1000.00
1899	Tanana Electric Co.	2600.00
2080	“ “ “	25397.38
1380	Thompson et al.	250.00
1583	Truitt, D. W.	1000.00
358	Timmerman, C.	105.00
1442	Thompson, W. F.	358.80
1686	Tharp, Rusk & Smith	2313.45
[42]		
2007	Tharp, Rusk & Smith	2500.00
2018	“ “ “	1000.00

2008	Tharp & Rusk.....	2000.00
1787	Vedin, Gus.....	1587.00
2035	Witte Pascal et al.....	545.00
2106	Webb, W. A.....	200.00
2079	Williams, A. J.....	600.00
1063	Wickersham, Edgar.....	560.00
1993	Waters, Emile.....	40.00
1054	Morgan, J. et al.....	200.00
1820	Wilson, E. M. et al.....	100.00
1821	“ “.....	100.00
1779	Wile, L. & Boss, A.....	400.00
1922	Warren, Minnie.....	86.50
1778	“ “.....	180.00
1629	Williams, E. & Dora.....	3000.00
2012	Young, S. Hall.....	575.00
1391	Zimmerman, J. F. et al.....	900.00
2056	Zuber, Anthony et al.....	650.00
1835	York, J. T.....	100.00
216	“ “.....	100.00
260	“ “.....	500.00

Total.....\$353842.54

CLEARY BRANCH.

James Coyle & J. A. Grant.....	300.00
Al. Hilty.....	200.00
E. M. Bockfinger & P. A. Wilson.....	300.00
Gunner Nelson & C. Ericson.....	100.00
M. J. McDermott.....	200.00
John Hamilton, A. J. Nordale, John Flygar.....	2820.00

Total..... \$3920.00

EXHIBIT A.

STATEMENT OF THE GOLD BAR LUMBER CO., OCTOBER 1, 1907.
RESOURCES.

Camp Equipment	31910.23
Horses and Wagons	501.06
Insurance	1686.60
Lumber	37679.68
Lighting Equipment	2808.45
Mill Site	5000.00
Mill Buildings	23403.58
Mill Equipment	68665.34
Northern Bank & Trust Co.	2080.22
Office Fur. & Fixt.	545.13
Real Estate	18400.00
Timber Lands	204956.05
Valley Supply Co., Stock	9574.16
Water System	10313.82
Accounts Receivable	18806.96
<hr/>	
Total Resources	436331.28

LIABILITIES

Bills Payable	68112.82
Wages due	6062.47
Accounts payable	3036.81

Total Liabilities 77212.10

NET RESOURCES 359119.18

GAINS

Cook Camp	970.28
Lumber Sales	186738.10
Light Rents	79.25
Real Estate	47.32
Rents	2684.56
Valley Supply Co., Stock	4574.16
Water Rents	165.42

Total Gains 195259.09

LOSSES

Depreciation Camp Equip.	3545.58
“ Horses and Wagons	55.67
“ Light Equipment	312.05
“ Mill Buildings	2600.39
“ Mill Equipment	7629.48
“ Furniture & Fixtures	60.57
Cruising Account	302.85
Camp Expense	4804.37
General Expense	9489.62
Interest & Discount	5807.22
Insurance	4382.36
Labor	125008.96
Mill Expense	6248.03
Profit & Loss	4554.93
Real Estate Repairs	391.28
Taxes	2619.40

Total Losses 177812.76

NET GAIN

17446.33

CAPITAL Stock Oct. 1, 1906	12000.00
Surplus “ “	329672.85

[44]

Net Resources Oct. 1, 1906	341672.85
Net Resources Oct. 1, 1907	359119.18
Add increase in value of Timber Lands 1/3	68318.68
	<hr/>
	427,437.86
4/5 interest value	341,949.00

[45]

STATEMENT OF THE CONDITION OF THE VALLEY SUPPLY CO.,
Oct. 1, 1907.

RESOURCES.

Cash	211.30
Merchandise	11953.90
Furniture and Fixtures	926.48
Accounts Receivable	2652.42

Total Resources

15744.10

LIABILITIES

Accounts payable	6169.94	
Total Liabilities		6169.94

Net Resources Oct. 1, '07		\$9574.16
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PROFITS

Merchandise	5833.46	
P. O. Receipts	266.87	
Interest & Discount	1563.38	
Total profits		7663.71

LOSSES

Expense	220.91	
Rent	800.00	
Labor	3034.02	
Depreciation Fur. & Fixt.	102.94	
Total losses		4157.87

Net Gain		3505.84
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Capital invested June 1, '06		6068.32
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Net Resources Oct, 1, '07		9574.16
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[46]

Exhibit "B."

FAIRBANKS BANKING COMPANY.

LIST OF OVERDRAFTS AS MARCH 16,1908.

Asheim S	37.11
Adcock Mrs.	240.06
Barnette E. T.	130.17
Barnette & Yarnell	1162.05
Boarman F. B.	2069.50
Chapman G. H.	5.00
Collins John	7.45
Emberley Isabelle	8.93
Fox James	1.00
Higgins Geo. C.	50.00

Kearney C. J.	735.50
Kennedy D. A.	1.23
Kennedy D. T.	174.00
Matheson & Holmquist	1.25
Merrill G. H.	3.00
Morrison Ronald	578.27
Monarch Association	289.20
MacCormack Edith	14.05
McMullen Ed.	11.00
News Publishing Co.	16.33
Steamer White Seal	9.75
Smith A. T.	52.26
Sigler Chas. T.	31.06
Schilling, G. L.	2621.58
Scott & Spencer	14.04
Sullivan, M. L. Witness	18.25
Wisconsin Group Assn.,	43.75
Worman, C. N.	1.00
	<hr/>
	\$8326.79
	<hr/>

[47]

[Endorsed]: No. 1756. In the District Court for the Territory of Alaska, Fourth Division. *F. G. Noyes*, Receiver of the Washington-Alaska Bank, Plaintiff, vs. *J. A. Jesson*, et al., Defendants. Amended Complaint. Filed in the District Court, Territory of Alaska, 4th Div. May 23, 1913. C. C. Page, Clerk. By *H. C. Green*, Deputy. [48]

[Title of Court and Cause.]

No. 1756.

**Separate Answer of Defendants R. C. Wood, J. A.
Healey and John L. McGinn.**

Comes now the defendants R. C. Wood, J. A. Healey and John L. McGinn, and, answering the amended complaint of the plaintiff on *file* herein, say:

I.

Answering paragraph 3 of said complaint, these defendants—

Deny that E. T. Barnette, R. C. Wood, and James W. Hill circulated or caused to be circulated in the city of Fairbanks or vicinity or elsewhere stock subscription lists subscribing to the capital stock of said corporation, which said stock subscription lists omitting the signatures, were or are in words and figures set forth in paragraph 3 of said amended complaint.

II.

Answering paragraph 4 of said amended complaint the defendants—

Admit that E. T. Barnette signed said subscription list for four hundred and forty (440) shares of capital stock of said corporation, and that James W. Hill signed said subscription list for two hundred and twenty (220) shares of said capital stock; but deny that the same was signed or subscribed by the said R. C. Wood for two hundred and twenty (220) shares or any shares. [49]

And deny that said James W. Hill, R. C. Wood and

E. T. Barnette caused said subscription lists to be circulated, or that they circulated the same.

III.

Answering paragraph 5 of said amended complaint, defendants—

Deny that the first meeting of the incorporators or subscribers to the capital stock of the Fairbanks Banking Company, a corporation, was held at Fairbanks on March 12th, 1908, but allege that said first meeting of the incorporators and subscribers to the capital stock of said Fairbanks Banking Company, a corporation, was held upon the 8th day of February, 1908.

Deny that on the 12th day of March, 1908, a board of twelve directors for said corporation, named or selected by said E. T. Barnette, were elected.

Deny that the said E. T. Barnette named or selected said Board of Directors otherwise than by placing the names of said persons in nomination at the meeting of the subscribers and stockholders held February 8th, 1908.

IV.

Answering paragraph 6 of said amended complaint these defendants—

Deny that on the 13th day of March, 1908, said Board of Directors authorized the acquisition or purchase of the Fairbanks Banking Company, a partnership, or the assets in business of said Fairbanks Banking Company, a partnership, otherwise than as in the further and separate and affirmative defense of these defendants hereinafter set forth.

Deny, except as in the further and separate an-

swer of these defendants hereinafter set forth, that the purchase or acquisition of the assets or business of the Fairbanks Banking Company, a partnership, or the terms thereof, were reduced to writing in a contract signed or executed by the parties, dated March 16th, 1908.

And deny, that a true copy of the same is attached to the [50] amended complaint and marked "Exhibit 1."

V.

Admit that there was issued to E. T. Barnette two hundred and sixty (260) shares of the capital stock of said corporation, but deny that the same was done in accordance with said contract marked "Exhibit 1."

Admit that there was one hundred and thirty (130) shares of the capital stock of said corporation issued to James W. Hill; but deny that the same was in accordance with the contract marked "Exhibit 1," or otherwise than as hereinafter set forth in the further and separate answer of these defendants.

Deny that there was ever issued to R. C. Wood one hundred and thirty (130) shares of the capital stock of said Fairbanks Banking Company.

Admit that the assets of said copartnership, enumerated and described in said contract, "Exhibit 1" were transferred to said corporation, but deny that the same was done in accordance with said contract marked "Exhibit 1," or otherwise than as set forth in the further and separate answer of these defendants.

VI.

Answering paragraph 8 of said amended complaint, these defendants—

Deny that at, or immediately prior to, the transfer of the assets of the Fairbanks Banking Company, a copartnership, to the Fairbanks Banking Company, a corporation, the capital stock of the Gold Bar Lumber Company was carried on the books of said corporation in the sum of \$248,067.89 or a less sum than \$341,949.00.

Deny that at the date of said transfer the value of said Gold Bar Lumber Company stock was a sum less than \$248,067.89.00, or was of a less value than the sum of \$341,949.00.

Deny that said stock was transferred to and received by the said Fairbanks Banking Company, a corporation, at an arbitrarily increased, or grossly fraudulent, or any over valuation of more [51] than \$93,881.11, or any sum whatsoever. And deny that the same or all of it was done or accomplished with the full knowledge, cooperation, or consent of all the defendants Dan Ryan, C. J. Robinson, M. H. McMullen, C. E. Claypool, Robert Sheppard, Hans Stark, John Flygar, J. A. Jesson, D. H. Jonas, David Yarnell and John P. Anderson, or of the defendants R. C. Wood, James W. Hill, B. R. Dusenbury and John L. McGinn.

And deny that at said time the said R. C. Wood was the cashier of said Fairbanks Banking Company, a corporation, or that he was within the district of Alaska.

Deny that the business of the Gold Bar Lumber

Company was then, or ever since has been, or still is, of an extremely hazardous or speculative nature.

Deny that the capital stock of said Gold Bar Lumber Company was not delivered to said Fairbanks Banking Company, a corporation.

VII.

Answering paragraph 9 of said amended complaint, these defendants—

Deny that the defendants R. C. Wood and John L. McGinn were then officers or directors of said corporation.

Deny that of the notes so sold or transferred to said corporation a large amount were then past due, worthless, or uncollectible. And deny that the amount of past due, worthless and uncollectible paper was a sum in excess of \$53,000.00, or any sum; and deny that the same are still unpaid or without substantial value; and deny that the list of notes, with the amounts thereof, as set forth in paragraph 9 of said amended complaint were worthless or uncollectible, or that the same are worthless and uncollectible, *or that the same are worthless and uncollectible.*

Deny that it was then and there well known to said defendants directors or officers aforesaid, or by each of them, or, by the exercise of ordinary or great care might have been so known to them, or each or any of them, that the said notes listed in said paragraph 9 of said amended complaint, were at the time that the [52] same were accepted or transferred to said Fairbanks Banking Company, corporation, past due or worthless or without substantial value.

VIII.

Answering paragraph 10 of said amended complaint, these defendants—

Deny that for the 1502 shares of the capital stock of said corporation issued on March 14, 1908, the same were all paid for by promissory notes, but allege that some were paid for in cash.

Deny that a large amount of said notes were or still are worthless or uncollectible, or that the same have never been paid.

And deny that the amount of said worthless and uncollectible notes is of the face value of \$22,982,33, or any other sum.

IX.

Answering paragraph 11 of said amended complaint, these defendants—

Deny that there was an issued capital stock of \$202,200, or a greater sum than \$189,200.

Deny that with no other assets than those of the Fairbanks Banking Company, a copartnership, as mentioned and set forth in "Exhibit 1," added to said stock subscription notes of the face value of \$150,200, the Fairbanks Banking Company, a corporation, on March 16, 1908, commenced business as a bank.

Deny that the amounts and the assets set forth in said paragraph 11, constituted all of the assets of said Fairbanks Banking Company, a corporation.

Deny that the sum of \$200,000 belonging to E. T. Barnette was an "alleged" special deposit, and deny that the same was not in fact deposited by the said E. T. Barnette.

X.

Answering paragraph 12 of said amended complaint, these defendants—

Deny that on March 16, 1908, when said Fairbanks Banking Company, a corporation, commenced business, that said corporation [53] was actually insolvent in this, or otherwise, that its assets were then insufficient in value to pay its debts, but allege that in truth and in fact the assets of said corporation at said time were more than ample to pay all of its debts and obligations.

Deny that knowledge of the actual insolvency of said bank was then known to the directors or officers of said institution hereinbefore mentioned, or, by the exercise of great, ordinary, or other care might have been known.

Admit that said bank on the 16th day of March, 1908, was upon a “scrip” basis, but allege that all the other banks in the Fairbanks Recording District, and the major portion of the banks throughout the United States was upon the same “scrip” basis owing to the financial “flurry” in existence at that time.

XI.

Answering paragraph 13 of said amended complaint, these defendants—

Deny that said bank, or the defendants mentioned in the amended complaint, or the officers, directors and employees of said bank, at all times or any times falsely or wrongfully or otherwise represented or held out to the public generally or otherwise that said Fairbanks Banking Company, a corporation, had paid up capital stock of \$300,000.

XII.

Answering paragraph 14 of said amended complaint, these defendants—

Deny that John L. McGinn was a director of said bank from and including the 13th day of September, 1909 to the 12th day of May, 1910,

Deny that John L. McGinn and R. C. Wood, or either of them, continued to act as directors of said bank subsequent to the 1st day of May, 1910.

XIII.

Answering paragraph 17 of said amended complaint, these defendants— [54]

Deny that the defendant L. N. Jesson acted as an executive officer of said corporation, or as a member of the executive committee thereof, until the 12th day of September, 1910, or any other time.

XIV.

Answering paragraph 18 of said amended complaint, these defendants—

Admit that at the meeting of the Board of Directors held March 12th, 1908, R. C. Wood was elected cashier of said bank, but deny that the said R. C. Wood thereupon accepted said office or entered upon his duties thereof, or that he accepted said office or entered upon his duties as cashier prior to the 17th day of April, 1908. Admit that he continued to perform the duties of cashier of said Fairbanks Banking Company, a corporation, until June 29th, 1908; but allege in this connection that upon the 12th day of May, 1908, said R. C. Wood tendered his resignation to said corporation as cashier and requested to be relieved of his duties, but, at the request of the

Board of Directors, continued to act as cashier until June 29th, 1908.

XIV.

Answering paragraph 19 of said amended complaint, these defendants—

Deny that shortly after the said Fairbanks Banking Company, a corporation, commenced business, said corporation wrongfully or unlawfully began to reduce its issued capital stock by accepting the surrender thereof or giving in return therefor either cash or the stock subscription notes given for said stock; and deny that a list of said stock so surrendered, together with the date of surrender and the number of shares surrendered and the names of the parties surrendering or the amount of cash or subscription notes returned thereof, is as is set forth in the list set out in said paragraph 19 in the amended complaint.

Deny that the defendant R. C. Wood ever surrendered any issued capital stock to said Fairbanks Banking Company, a [55] corporation, and deny that he was ever the owner of the same.

Deny that the defendant John L. McGinn ever sold or surrendered, or that the Fairbanks Banking Company, a corporation, ever received, any stock of the said John L. McGinn, or that said corporation ever paid the said John L. McGinn any money therefor.

Deny that, during all the times from and including said 20 June, 1908, to and including said 25 October, 1910, the liabilities of said corporation to its general creditors greatly exceeded its assets, and deny that, by accepting the surrender of its capital

stock and returning, or returning, therefor cash and subscription, or subscription notes, as in said paragraph XIX alleged, the assets of said corporation to which said creditors could look for payment of their claims were further decreased, or that the same were, in the manner or amounts aforesaid, withdrawn or divided among the said stockholders of said corporation. Deny that the surrender of said stock or the return of cash or notes, as in said paragraph set forth, were made to or by said corporation with the full knowledge, consent, or approval of the defendants or each of them who constituted its Board of Directors or officers, on the dates set forth in said paragraph XIX, or that, by the exercise of ordinary, or great, care the same could have been known to them or each of them. Deny that any stock surrendered to said corporation, after the 15th day of March, 1909, was done with the knowledge, consent, or approval of the Board of Directors of said bank, or with the knowledge, consent or approval, of the defendants.

Answering paragraph XX of said amended complaint, these defendants deny that there were issued 2020 shares of the capital stock of said corporation on the 4th day of March, 1908, or greater amount than 1892 shares, and as to whether, by reason of the surrender or cancellation of shares, as mentioned in said paragraph XIX of the said complaint, the total issued capital [56] stock never exceeded 2156 shares, or after the 9th day of November, 1909, never exceeded 1726 shares, these defendants have no knowledge or information sufficient to form a belief,

and therefore deny the same.

Answering paragraph XXI of said amended complaint, the defendants deny each and every allegation, matter, and thing contained therein, save and except as hereinafter set forth in the separate, further, and affirmative defense of these defendants.

Answering paragraph XXIII of said amended complaint, these defendants deny that John L. McGinn, on 13 September, 1909, was a director of said Fairbanks Banking Company, a corporation. Deny that said L. N. Jesson was a member of the executive committee of said corporation. Deny that, on 13 September, 1909, the said Washington-Alaska Bank of Washington had in its assets the sum of \$70040.10 of loans past due, and deny that the same were at said time, or still are, without substantial value, and deny that the said Washington-Alaska Bank of Washington was carrying its real estate and fixtures at \$10,000.00 or any sum in excess of their real value. Deny that said Fairbanks Banking Company, a corporation, with the express knowledge, consent, or approval of the defendants in said paragraph XXIII mentioned, its then directors or officers in said paragraph mentioned, on 13 September, 1909, or at any other time, paid to the stockholders of the Washington-Alaska Bank of Washington, for said capital stock thereof, a premium or bonus or more than \$100,000.00, or any other sum over and above the then paid-in capital stock of the Washington-Alaska Bank of Washington, or over and above the actual value thereof. Deny that thereby said defendants wrongfully or fraudulently lost or dissipated more

than \$100,000.00, or any sum of the funds or assets of said Fairbanks Banking Company, a corporation, or greatly, or at all, aggravated or increased its already insolvent condition, and deny that said Fairbanks Banking Company at said time was insolvent. Deny that [57] said Fairbanks Banking Company selected and appointed the defendant R. C. Wood manager of the three banks, viz.: the Fairbanks Banking Company, the Washington-Alaska Bank, or the First National Bank, and deny that the said three banks continued thereafter until on or about 12 May, 1910, to be managed or operated by the defendant R. C. Wood as manager. Deny that the same were but ostensibly managed and operated as separate and distinct and unassociated banks, and in this connection these defendants allege that the said R. C. Wood was appointed and selected by the said Fairbanks Banking Company as an advisory manager of said three banks, with authority only to confer and consult with the officers of said Fairbanks Banking Company and said Washington-Alaska Bank.

Answering paragraph XXV of said amended complaint, these defendants deny that, on 10 April, 1910, the Fairbanks Banking Company, a corporation, was controlled or was in the control or management of the Washington-Alaska Bank, and allege that, at said time prior and subsequent thereto, the affairs of the Washington-Alaska Bank were managed by its own Board of Directors, and that said Fairbanks Banking Company had no voice in the management of the affairs of said bank other than that of a stockholder. Deny that said Fairbanks Banking Com-

pany, a corporation, caused said Washington-Alaska Bank of Washington to declare or pay to the Fairbanks Banking Company, a corporation, a dividend of thirty-three and one-third per centum of the capital stock of said Washington-Alaska Bank of Washington, amounting to the sum of \$50,000.00 and in this connection these defendants allege that the directors of said Washington-Alaska Bank did, on said date, declare a dividend of the sum of \$50,000.00 out of its surplus and undivided profits. Deny that, at the time said dividend was declared and for a period of seven months prior thereto, the management of the Fairbanks Banking Company, a corporation, the Washington-Alaska Bank of Washington, and the First National Bank, had been under the general management [58] of the defendant R. C. Wood, otherwise than as has been set forth in the preceding paragraph. Admit that the amount of the surplus and undivided profits of the Washington-Alaska Bank had decreased from the sum of \$66839.16 to \$57169.76, but deny that said decrease was a net loss of \$9669.40, or any amount, for seven months' operation, and defendants allege that said decrease was the result of the charging off of some bad loans. Admit that, on said day that said dividend was declared, the Washington-Alaska Bank of Washington had a capital stock of \$150,000.00 and a surplus of \$57169.76, but deny any information or knowledge sufficient to form a belief as to whether, on said date, it had among its assets loans and discounts past due without substantial value, or which had not yet been collected or can not be collected, amounting to the

sum of \$76005.35, or another amount. Admit that it had invested in a certificate of deposit of the Fairbanks Banking Company the sum of \$125,000.00 but deny that said Fairbanks Banking Company was insolvent and allege that said certificate was paid in full.

Answering paragraph XXVI of said amended complaint, these defendants deny that, on 12 April, 1910, said Fairbanks Banking Company, a corporation, acting by and through its then Board of Directors, by a resolution entered on the minutes of said Fairbanks Banking Company, a corporation, wrongfully and fraudulently declared and ordered to be paid on its then outstanding capital stock of \$168,600, a dividend of twenty per centum, amounting to \$33720.00.

Answering paragraph XXVII of said amended complaint, these defendants deny that, on 12 April, 1910, or at or before the time when said dividend mentioned in the preceding paragraph was ordered to be paid, the said Fairbanks Banking Company, a corporation was, or long prior thereto had been, in a grossly insolvent or failing condition. Deny that said Fairbanks Banking Company, a corporation, had, on said 12 April, 1910, no earnings, surplus or undivided profits on hand, out of which said [59] dividend could legally be paid, and deny that, at or prior to said date, said Fairbanks Banking Company had neither capital stock nor surplus. Deny that the Washington-Alaska Bank of Washington was a subsidiary corporation to the Fairbanks Banking Company, a corporation, and deny that the asset car-

ried by the Fairbanks Banking Company, on its books of \$75000.00 as a premium on the capital of said Washington-Alaska Bank, had no existence whatever and that the same was purely imaginary or of no value. Deny that the said Fairbanks Banking Company, a corporation, on said 12 April, 1910, carried as an asset, at their face value, loans or discounts which were past due, or were worthless, or that have not yet been paid, or that cannot be collected in a sum amounting to \$118250.47, or any other sum. Deny that the capital stock of the Gold Bar Lumber Company originally had been, or still was, on said 12 April, 1910, fraudulently overruled by a sum in excess of \$93881.11 or any sum. Deny that said dividend amounting to the sum of \$33-720.00 was wrongfully, unlawfully, or fraudulently declared or paid by said Fairbanks Banking Company, a corporation, with the express knowledge, consent or approval of the defendants D. H. Jonas, J. A. Jesson, John Flygar, C. J. Robinson, David Yarnell, Robert Shepard, R. Brumbaugh, John L. McGinn, R. C. Wood, J. A. Jackson, or James W. Hill, or of the defendant L. N. Jesson (and deny that said L. N. Jesson was a member of the executive committee of said corporation), or of R. C. Wood (and deny that said R. C. Wood was its general manager), out of, by, or with the funds and moneys of the depositors of said Fairbanks Banking Company, a corporation, and not by, out of, or with the surplus earnings and undivided profits of said Fairbanks Banking Company, a corporation, and as to whether, on said 12 April, 1910, said Fairbanks

Banking Company, a corporation, owed to depositors the sum of \$960689.79, these defendants have no knowledge or information sufficient to form a belief and therefore deny the same. [60]

Answering paragraph XXVIII of said amended complaint, these defendants deny that, shortly prior to 12 May, 1910, said E. T. Barnette, as president of the Fairbanks Banking Company, a corporation, and of the Washington-Alaska Bank of Washington, by and with the knowledge and consent of the directors and officers of said Fairbanks Banking Company, a corporation, wrongfully sold or transferred to the defendants R. C. Wood, and John L. McGinn, the entire capital stock of said First National Bank, for the sum of \$125,000.00. Admit that said sale and said transfer of said stock of said First National Bank to the defendants R. C. Wood and John L. McGinn was claimed to have been made under and pursuant to an option, claimed to have been given to the defendant Wood at the time said stock was purchased by said Fairbanks Banking Company, a corporation, and the said Washington-Alaska Bank of Washington, but deny that said option was entered unto without consideration and was void and allege that said option did in fact exist. Deny that the capital stock of said First National Bank was carried by the said Fairbanks Banking Company, a corporation, for an entire year, without any interest or profit paid or received by said Fairbanks Banking Company, a corporation, and solely, or solely, for the use, benefit, and profit of said defendants R. C. Wood and John L. McGinn, and deny that the same was

done, suffered or permitted by and with the knowledge, consent or approval of all *then* then directors and officers of the said Fairbanks Banking Company, a corporation, and deny that, by said act, the said Fairbanks Banking Company, a corporation, was damaged in a large sum, to wit, in a sum in excess of \$25,000.00 or any sum.

Answering paragraph XXIX of said amended complaint, these defendants deny that, on 12 May, 1910, and long prior thereto, the said R. C. Wood and John L. McGinn had full or complete knowledge, or means of knowledge, of the grossly insolvent and [61] failing condition of said Fairbanks Banking Company, a corporation, and deny that, at said time, said Fairbanks Banking Company, a corporation, was in a grossly insolvent or failing condition. Admit that they knew that said E. T. Barnette had not, at said time, withdrawn his deposit of \$200,000.00. Deny that said R. C. Wood and John L. McGinn then or there knew that said E. T. Barnette was likewise aware of the said insolvent or failing condition of said Fairbanks Banking Company, a corporation, and deny that said Fairbanks Banking Company, a corporation, was insolvent or in a failing condition. Deny that said Wood and McGinn knew that said Barnette could or would shortly withdraw *in case* the whole of said alleged special deposit of two hundred thousand dollars. As to whether said E. T. Barnette did actually withdraw, within sixty days after 12 May, 1910, said sum of two hundred thousand dollars, these defendants have no knowledge or information sufficient to form

a belief and therefore deny the same. As to whether said E. T. Barnette, by withdrawing said sum of two hundred thousand dollars, thereby preferred himself as a creditor of said Fairbanks Banking Company, a corporation, these defendants allege that they are without sufficient legal knowledge or information sufficient to form a belief and therefore deny the same, and as to whether the withdrawal of said money and all of the things alleged in said paragraph XXIX of plaintiff's amended complaint were done with the knowledge, consent, and approval of the then Board of Directors and officers of said Fairbanks Banking Company, a corporation, these defendants have no knowledge or information sufficient to form a belief and therefore deny the same.

V.

Answering the allegations of paragraph XXX of said amended complaint, this answering defendant admits the consolidation of the Fairbanks Banking Company and the Washington-Alaska Bank, in the manner therein set forth, but alleges that they have no knowledge or information as to the amount due to the depositors at the time of said consolidation, as therein alleged, and, by reason of [62] his lack of information and belief in the matter, denies that there was owing to said depositors the sum of \$947-800.29.

Further answering the allegations of said paragraph XXX, these answering defendants deny that said Washington-Alaska Bank of Washington had no undivided profits on hand at the time of said consolidation, and avers that, as he is informed and be-

lieves and therefore so alleges on such information and belief, the said Washington-Alaska Bank of Washington had on hand undivided profits in the sum of \$4658.92; that answering defendant is informed and believes, and basing his denial on such information and belief, denies that the capital stock of the said Washington-Alaska Bank of Washington was seriously impaired or impaired in any way, as alleged in said paragraph, denies that said bank had on hand at said time loans and discounts in the sum of \$100704.98, which were bad, worthless, and uncollectible, and have not been paid, or that were bad, or worthless, or uncollectible; alleges that answering defendant has no information or belief as to whether or not the loans referred to in said paragraph were carried on the books of the Washington-Alaska Bank of Washington at their face value or at their present worth, and defendant alleges that he has no information or knowledge as to whether or not said notes have been paid, but is informed and believes that a portion of said notes has since been paid, and basing his denial on such information and belief and lack of information, denies that the notes of the face value of \$100707.98, carried by the Washington-Alaska Bank of Washington on its books on the first day of October, 1910, have not been paid; denies that, on the first day of October, 1910, or at any other time alleged in plaintiff's amended complaint, the directors of the Fairbanks Banking Company knew that notes, of the value of \$100704.98, carried on the books of the Washington-Alaska Bank of Washington, were worthless, or bad, or uncollectable, or that any

material portion thereof was so worthless, [63] or bad, or uncollectable; admits that, after said consolidation said Fairbanks Banking Company, a corporation, continued to carry on and conduct a banking business at the town of Fairbanks as formerly, but under the name of the Washington-Alaska Bank, and denies that, at all times after the first day of October, 1910, or at any time after said first day of October, 1910, said directors fraudulently and without right, or fraudulently or without right, carried on the books of the said Washington-Alaska Bank, as a book asset, the item "Premium Washington-Alaska Bank stock, \$75000.00"; admits that said item was carried on the books as therein set forth, but denies that said asset had no existence whatsoever, or that the same was purely imaginary, false, and fraudulent, or imaginary, or false or fraudulent.

VI.

Answering the allegations of paragraph XXI of said amended complaint, this answering defendant admits that, subsequent to the first day of October, 1910, and up to and including the fourth day of January, 1911, the Washington-Alaska Bank, formerly the Fairbanks Banking Company, continued actively in business as a bank and received deposits from the public generally, but denies that said bank was, during said time, insolvent and in a failing condition or insolvent or in a failing condition, as alleged in said paragraph; admits the other matters and things in said paragraph contained.

VII.

Answering the allegations of paragraph XXXII,

this answering defendant avers that he has no knowledge or information as to the exact amount of the liabilities of said Washington-Alaska Bank on the fourth day of January, 1911, as alleged in said paragraph, but denies that the assets of said Washington-Alaska Bank were, by reason of wrongful, fraudulent, and negligent acts of this answering defendant, or of the Board of Directors of which this defendant was a member, rendered insufficient to pay said liabilities in full, and denies that the assets of said bank were impaired, injured or rendered insufficient to [64] pay the liabilities of said bank, by reason of any act or thing done by this answering defendant or his codirectors during the time this defendant was a member of said Board of Directors.

VIII.

Answering the allegations of paragraph XXXIII of plaintiffs said amended complaint, this answering defendant denies that the receivers have reduced to cash as far as possible the assets of the Washington-Alaska Bank; admits that there have been paid on the acknowledged and proven liabilities of the bank dividends aggregating fifty per centum, and answering defendant alleges that he has no knowledge or information as to whether or not \$12627.70 of said dividends have either not been called for or have been withheld by order of court; answering defendant is informed and believes and therefore so alleges that a portion of the claim of the Dexter Horton National Bank of Seattle has been paid, and basing his denial on such information and belief, denies that there is due or owing to said Dexter Hor-

ton National Bank of Seattle the sum of \$128899.37, but alleges that he has no knowledge of how much is due to said bank; answering defendant further alleges that he has no information as to whether creditors to the amount of \$4132.62 have failed to prove their claims or have not demanded dividends.

IX.

Answering the allegations of paragraph XXXIV, this answering defendant admits that, on the fourth day of January, 1911, there was due and owing to the Dexter Horton National Bank of Seattle a large sum of money, the exact amount of which is to this answering defendant unknown, and admits the remainder of said paragraph.

X.

Answering the allegations of paragraph XXXV of plaintiff's amended complaint, this answering defendant denies that the stock of the Gold Bar Lumber Company belonging to the Washington-Alaska [65] Bank, a corporation, is subject to any claims of the Dexter Horton National Bank of Seattle, other than its claim as a general creditor against the same, and alleges that he has no information or knowledge as to whether or not F. G. Noyes, as receiver of the Washington-Alaska Bank, has made efforts to sell said stock, or that he has been unable to obtain for said stock an offer in excess of the claim of said Dexter Horton National Bank, or any other sum whatsoever; so neither admits nor denies said allegation; answering defendant is informed and believes, and basing his denial on such information and belief, denies that the stock of the Gold Bar Lumber Com-

pany has no value in excess of the claim of the Dexter Horton National Bank of Seattle, and denies that any valuation in excess of said sum is wholly uncertain and speculative.

XI.

Answering the allegations of paragraph XXXVI of plaintiff's amended complaint, this answering defendant alleges that he has no exact information or knowledge as to the character and amount of the assets of said bank now in the hands of the receiver other than the Gold Bar Lumber Company stock, as alleged in said paragraph, sufficient to form a belief, and expressly denies that there are not now in the hands of the receiver, and were not in said receiver's hands at the time of the filing of said complaint, other assets than the assets set forth in said paragraph, available for the purpose of paying the creditors of said bank.

Answering the allegation that bills, notes, and overdrafts of the face value of \$266,020.31 are not of that value, this answering defendant alleges that he has no information or knowledge sufficient to form a belief as to said matters, and basing his denial on such lack of information and belief, denies the same. Denies that only \$80,000.00 thereof, is owing from solvent debtors and can be collected, and denies that the balance thereof [66] is bad, worthless, and uncollectible, or bad, or worthless, or uncollectible. Answering defendant alleges that he has no knowledge as to the actual cash or market value of the real estate, furniture, and fixtures, sufficient to form a

belief in order to enable him to admit or deny the same.

XII.

Answering the allegations of paragraph XXXVII of plaintiffs said amended complaint, defendant denies the matters and things therein set forth.

XIII.

Answering the allegations of paragraph XXXVIII of said amended complaint, this answering defendant denies each and every matter and thing therein contained.

XIV.

Answering the allegations of paragraph XXXIX of plaintiff's said amended complaint, this answering defendant denies each and every matter and thing therein contained.

And defendants, for a further, separate, and affirmative defense, allege that, on 12 December, 1907, owing to the unusual and continuous withdrawal of funds by the depositors of the Fairbanks Banking Company, a copartnership, brought about by a feeling of unrest in financial circles all over the United States as well as in the Tanana Valley, the said Fairbanks Banking Company, a copartnership, was compelled to close its doors and suspend business. A meeting of the depositors and creditors of said bank was immediately called and, on 14 December, 1907, at the United States courthouse in Fairbanks, Alaska, a large meeting of the depositors and creditors of said bank was held, at which meeting a committee consisting in W. G. Cassels, C. E. Claypool, Dan Ryan, George Preston, and D. H. Jonas,

was elected, by open ballot of the depositors and creditors present, to investigate and examine into the affairs of the said [67] Fairbanks Banking Company and to report back to the meeting of the depositors and creditors to be held on 16 December, 1907. That said committee so selected consisted in men of high standing in this community for honesty, integrity, and good business judgment. That said committee, acting according to instructions, and after having obtained expert accountants, proceeded to examine carefully into the affairs of said bank, and, after examining all the books, vouchers, documents, and other evidences of the affairs of said bank, and after separately scrutinizing all the notes, mortgages, certificates, and other resources of said bank, made a report to the said meeting of depositors on 16 December, 1907, of the resources and liabilities of said bank, and in said report declared and stated that the resources of said bank exceeded its liabilities in the sum of \$288579.73. That said committee reported that the net value of the Gold Bar Lumber Company stock,—a corporation of the State of Washington,—held by the said Fairbanks Banking Company, was the sum of \$341949.00. That, on examining the loans, the same were divided into three classes; class No. 1 being the class which said committee considered as gilt-edged; class No. 2 being the class which said committee considered as perfectly good and class No. 3 being the class that the committee considered might be doubtful, and which said last or doubtful class amounted to the sum of \$66235.44, and which said last or doubtful class was

eliminated and not considered in arriving at the resources of said Fairbanks Banking Company. That the committee, hereinbefore mentioned, was known as the board of trustees of the Fairbanks Banking Company, a copartnership, and continued to act in that capacity until the said Fairbanks Banking Company, a copartnership, was taken over by the corporation.

That, in the fore part of January, 1908, a large number of business, professional, and mining men, representative men of [68] the Fairbanks precinct, met in the town of Fairbanks, Alaska, for the purpose of organizing a corporation to purchase, take over, and absorb the business of the Fairbanks Banking Company, a copartnership, and at said meeting negotiations were begun by said mining, professional, and business men with the Fairbanks Banking Company, a copartnership, for the purchase of the same. That said meeting was a preliminary one, and that thereat it was agreed that a corporation should be organized under the laws of the State of Nevada, for the purpose of taking over and absorbing and purchasing said Fairbanks Banking Company, a copartnership. That the name of said corporation should be the Fairbanks Banking Company. That the amount of the capital stock should be \$300,000.00, divided into 3000 shares of the par value of one hundred dollars each. That the property of said bank should be turned over and that, in the event a surplus of assets over liabilities was found to exist, after deducting the sum of two hundred thousand dollars, which was the personal prop-

erty of said E. T. Barnette, stock should be issued to E. T. Barnette for one-half of said surplus, and that either stock or money should be paid to R. C. Wood and James W. Hill, at their option, for the other half of said surplus. That, at said time, it was contemplated that, owing to the great distance between Fairbanks, Alaska, and the State of Nevada, and the uncertainty and slowness of travel, the organization of the said corporation could not be perfected before 15 February, 1908, and it was agreed among said proposed incorporators that the issue of stock for said corporation should be as of date 15 February, 1908, and that the amount of stock subscribed by any person, other than that subscribed for property, should on said 15 February, 1908, be paid for either in cash, or in the event that, at said time, said subscriber was not able to make any cash payment on said stock, each subscriber should give his promissory notes for the individual amount of stock subscribed by him, one due on or before 1 June, 1908, for twenty-five per [69] centum of the amount of the capital stock subscribed by him, and the other for seventy-five per centum thereof, which should become due and payable on or before the first day of July, 1908, said notes to bear interest at the rate of one per centum a month from the date of the issuance of the stock until paid. Further it was agreed that, if at the time the stock should be issued, any of the subscribers should pay therefor an amount equal to twenty-five per centum thereof, then such subscriber was to execute his note for the remaining seventy-five per centum due on or before

the first day of July, 1908. It was also agreed that, if said payment so made should not equal twenty-five per centum of the par value thereof, then such subscriber agreed to execute another note for an amount equal to twenty-five per centum thereof, which should become due and payable on or before the first day of June, 1908, and a note for the remaining seventy-five per cent as hereinbefore set forth.

And for the purpose of carrying out the object of the hereinabove mentioned meeting, a committee consisting of J. A. Jesson, C. E. Claypool, and D. H. Jonas, was appointed to go into the details of the reorganization of the Fairbanks Banking Company and of the *talking* over of the business of said institution by said proposed new corporation. That said committee met on 5 January, 1908, and after investigating the affairs of the bank made the following report to be presented for the consideration of the proposed new incorporators:

(a) That the issued stock for the proposed new corporation be as of date February 15, 1908; that notes be taken for all deferred payments; that the same bear interest at the rate of one per cent per month from February 15, 1908, until paid; that twenty-five per centum of the unpaid for stock be due and payable on or before June 1st, 1908, and that the balance be due and payable on or before July 1st, 1908. [70]

(b) That Captain E. T. Bārnette and James W. Hill, with such associates as they may require, prepare a subscription list.

(c) That the amounts subscribed by any person

be left to that person, and in case of over-subscription should be reduced proportionately.

(d) That the notes, properties, and securities of the Fairbanks Banking Company, the old institution, examined by its present acting board of trustees and on which a valuation of \$288,000.00 in excess of its total liabilities was placed, be accepted.

(e) That all notes, properties, and securities which said board of trustees placed in the No. 3 or doubtful class remain the property of the old institution.

(f) That all interest on existing loans as of December 19, 1907, be computed to February 15, 1908, and that the amount of such accrued interest be placed to the credit of the old institution on the books of the new corporation, and that the same be payable on or before December 31, 1908.

(g) That should James W. Hill and R. C. Wood not take the full forty-four thousand dollars in stock in the new corporation, the balance of the amount not so taken to be paid to them not later than July 1st, 1908.

(h) That the proposition of Captain E. T. Barnette to leave on deposit with the new corporation the sum of two hundred thousand dollars, without interest for one year be accepted, and that it be the understanding that such deposits will secure said new corporation against any adverse decision of the Court in the Caustens vs. Barnette suit in so far as such decision may decrease the value of the Gold Bar Lumber Company property as accepted by the present board of trustees.

(i) That the officers of the new corporation be a president, vice-president, second vice-president, cashier, assistant cashier, treasurer, and secretary. [71]

(j) That the number of the Board of Directors be twelve, four to be elected for six months, four for twelve months, and four for eighteen months or until their respective successors are duly elected and qualified.

(k) That dividends be declared semi-annually on June 30, and December 31.

Which said report was, on 6 January, 1908, submitted to an adjourned meeting of the professional, mining and business men—the proposed incorporators—and at said meeting the said report was read and passed on section by section as read, and on motion duly made and carried was adopted and ordered kept as a part of the records of said meeting. That at said meeting a subscription list, a copy of which is set forth in paragraph III of said amended complaint, was presented and signed by the said proposed incorporators, setting forth the amounts for which each respectively subscribed. At said meeting it was also agreed, on behalf of the Fairbanks Banking Company, represented by E. T. Barnette and James W. Hill, that said Fairbanks Banking Company, a copartnership, would turn over to said corporation the property of said Fairbanks Banking Company, a copartnership, on the terms specified in said report, and said proposed incorporators, in behalf of said proposed corporation, in consideration thereof, agreed to assume the liabili-

ties of the Fairbanks Banking Company, a copartnership.

That said Fairbanks Banking Company, a corporation, became a corporation on the 21st day of January, 1908. That, on the 8th day of February, 1908, a meeting of the subscribers of the capital stock of the Fairbanks Banking Company was held for the purpose, among others, of obtaining the notes of the subscribers for the stock subscribed by them, and at said meeting said stock notes were subscribed. That at said time the articles of incorporation of said Fairbanks Banking Company had not yet been received from the State of Nevada, and for the purpose of expediency *at* was deemed advisable to elect a Board of Directors, [72] and twelve directors were elected at said meeting, and it was agreed that said Board of Directors should act as such until the arrival of the articles of incorporation, when a formal meeting would be held and proper by-laws be adopted.

That said articles of incorporation did not reach Fairbanks until some time in the month of March, 1908, and immediately thereafter a meeting of the stockholders of the Fairbanks Banking Company was called, and at said meeting said stockholders, among other things, adopted by-laws and elected a board of directors, and also passed a resolution to the effect "that the matter of taking over the property of the Fairbanks Banking Company, a copartnership, consisting of E. T. Barnette, James W. Hill, and R. C. Wood, be left to the Board of Directors."

That, immediately after the adjournment of said stockholders' meeting, the Board of Directors met and organized by the election of a president, vice-president, cashier, assistant cashier, secretary, and treasurer, and at said meeting it was moved and duly seconded that "the Board of Directors ratify the arrangement as to the taking over of the assets, property, business, and liabilities of E. T. Barnette, James W. Hill, and R. C. Wood, upon the terms and conditions as are set forth in the minutes of the meeting of the subscribers held January 5th, 1908, and which is as follows: That the notes, properties, and securities of the Fairbanks Banking Company, the old institution, examined by its present acting board of trustees, and on which a valuation of \$288,000.00 in excess of its total liabilities was placed, be accepted, and that all notes, properties, and securities which said board of trustees placed in the No. 3 or doubtful class remain the property of the old institution, and that all interest on existing loans as December 12, 1907, be computed to February 15, 1908, and that the amount of such accrued interest be placed to the credit of the old institution on the books of the new corporation, and that the same be payable on or before December 31, 1908; and should James W. Hill [73] and R. C. Wood not take the full forty thousand dollars in stock in the new corporation, the balance of the amount not so taken be paid to them not later than July 1st, 1908, and that the proposition of Captain E. T. Barnette, to leave on deposit with the new corporation the sum of two hundred thousand dol-

lars without interest for one year, be accepted, and that it be the understanding that such deposit will secure said new corporation against any adverse decision of the Court in the Causten vs. Barnette suit in so far as such decision may decrease the value of the Gold Bar Lumber Company property as accepted by the present board of trustees; and that the executive committee be empowered to see that all papers and transfers be made properly by the officers of the old Fairbanks Banking Company and such transaction legally carried out." Which motion being duly put and seconded the same was unanimously carried.

That, at the meeting held by the proposed stockholders of said corporation on 6 January, 1908, it was believed by all present that the organization of the Fairbanks Banking Company, a corporation, could be perfected by 15 February, 1908, and that, by said date, said corporation could take over the affairs of the copartnership. It was then agreed that, as the expenses of operating the bank from that date up to the time of the taking over of the affairs of the copartnership by the corporation, would fall on the copartnership, that by reason thereof said copartnership should be entitled to all interest on existing loans until the affairs of the copartnership were turned over to the corporation, and for that reason said copartnership was declared to be entitled to interest on existing loans up to 15 February, 1908. At the meeting of the Board of Directors, held on 12 March, 1908, the matter of allowing the copartnership accrued interest up to 16

March, 1908, when it was contemplated that the corporation should take [74] over the business of the copartnership, was taken up and discussed, and it was moved and seconded that the following paragraph contained in the minutes of 5 January, 1908, of the proposed incorporators, to wit: "That all interest on existing loans as December 12, 1907, be computed to February 15, 1908, and that the amount of such accrued interest be placed to the credit of the old institution on the books of the corporation and the same be payable on or before December 31, 1908," be changed so that the words "February 15 be made to read "March 15," which said motion was duly carried.

That, during all the negotiations hereinbefore mentioned, the defendant R. C. Wood was not in Alaska, and was either in the State of California or the State of Washington, and he had no detailed knowledge or information as to what was being done by the copartnership or the terms of the sale to the corporation. That said Wood's name was signed to the original subscription list without his knowledge or consent, and with the understanding of all the subscribers that it was optional with the said R. C. Wood, on his return to Fairbanks, Alaska, to elect either to take stock in the new corporation or to receive money for the amount of stock to which he was entitled in lieu thereof.

That, in accordance with the instructions of the Board of Directors, the executive committee of said corporation proceeded to have the necessary papers and transfers made out, conveying the property

of the copartnership to the corporation on the terms stated in the resolution of 5 January, 1908, and requested the then attorneys for the bank, McGinn & Sullivan, to prepare the necessary papers for that purpose. That, in compliance with said request the said attorneys undertook to draw up an agreement, stating the true terms and conditions of the sale and transfer, which is the agreement attached to plaintiff's said amended complaint, and marked "Exhibit 1." That said agreement, through the mutual mistake of the copartnership and the [75] corporation and without the fault of either, failed to set forth truly all the terms and conditions of the agreement between the said Fairbanks Banking Company, a copartnership, and the corporation, in this, that said agreement failed to reserve to the said copartnership the accrued interest on all loans up to 15 March, 1908, and further in that it failed to embody the option given to said James W. Hill and R. C. Wood, either to take stock for their portion of the surplus property of the copartnership or to take money, and that in the event of their election to take money the amount should be paid not later than July 1, 1908. That, with said exception, said agreement attached to plaintiff's amended complaint and marked as "Exhibit 1" fully sets forth the terms and conditions agreed on and entered into between the Fairbanks Company, a copartnership, and the corporation.

That, in accordance with the true agreement had between the Fairbanks Banking Company, a copartnership, and the corporation, as set forth in a

preceding paragraph hereof, the Fairbanks Banking Company issued to E. T. Barnette 260 shares of the capital stock of said corporation, and to James W. Hill 130 shares thereof, but no stock was ever issued to said R. C. Wood. That said R. C. Wood returned to Fairbanks, Alaska, on or about 17 April, 1908, and at once notified the Fairbanks Banking Company, a corporation, of his election to take money in lieu of his stock, and said corporation then and there agreed thereto. That, on the return of the said R. C. Wood to Fairbanks, Alaska, he signed the agreement attached to plaintiff's amended complaint and marked "Exhibit 1," with the understanding on his part and of the Fairbanks Banking Company, a corporation, that said contract reserved to him the right to take money in lieu of stock, and it was never contemplated or understood by the said R. C. Wood, or by said corporation that, by signing said agreement he would waive any right to the election that he had [76] already made to take money in lieu of his stock. That said Wood, on or about 17 April, 1908, entered on his duties as cashier, and continued to act in said capacity until 12 May, 1908, when he tendered his resignation to the Fairbanks Banking Company, with the request that he be relieved of his duties at once and that said request be acted on. That, on said resignation being presented to the Board of Directors, it was the unanimous desire of all the directors present that the said R. C. Wood continue to act as cashier until said bank should get on a cash basis, said bank at said time being on what was known as a

script basis. The said Wood thereupon continued as such cashier up to and until 29 June, 1908, when his resignation was accepted. That said Fairbanks Banking Company, a corporation, in accordance with its understanding of the agreement existing between it and the said R. C. Wood, subsequently paid to him the sum of thirteen thousand dollars, being the amount of stock that he was entitled to receive, under the terms of the agreement entered into between the copartnership and the corporation. That the Board of Directors and the officers of said bank, in paying said money to said R. C. Wood, merely carried out the terms of the agreement entered into between the subscribers of stock and the copartnership on 5 January, 1908, and which was ratified as a part of the arrangement entered into between the copartnership and the corporation at the meeting of the Board of Directors held on 12 March, 1908.

That there was paid to said E. T. Barnette, James W. Hill, and R. C. Wood, by the Fairbanks Banking Company, the sum of \$39642.81 on account of interest accrued on loans up to and until the 15th day of March, 1908. That this amount paid by said corporation to said Barnette, Hill, and Wood, was done in accordance with the terms of the agreement made and entered into between the copartnership and the proposed incorporators on 5 January, 1908, save and except that the time thereof was subsequently extended by the Board of Directors from 15 February, 1908, to 15 March, 1908. [77]

That said contract so entered into between the

proposed incorporators and the copartnership was ratified by the corporation on 12 March, 1908, and the Board of Directors and officers of said corporation, in paying to the said Barnette, Hill, and Wood the said sum of \$39642.81, merely carried out the terms of the agreement entered into between the corporation and said persons, but, as hereinbefore stated, said provision was inadvertently and through mistake of the parties omitted from said contract attached to plaintiff's amended complaint and marked "Exhibit 1."

The defendants, particularly answering paragraph VI of said amended complaint, alleges that the acquisition and purchase by the Fairbanks Banking Company, a corporation, of the assets and business of the Fairbanks Banking Company, a copartnership, was done by the stockholders of said corporation, and that the agreement entered into between the Fairbanks Banking Company, a copartnership, and the proposed incorporators, was long prior to the election of the Board of Directors, and that said Board of Directors, in authorizing the taking over of the property of the said Fairbanks Banking Company, a copartnership, on the terms agreed, was merely carrying out the instructions of the stockholders and such act was merely a ratification of the arrangements entered into between the stockholders of said corporation and the Fairbanks Banking Company.

Particularly answering paragraph VIII of said amended complaint, the defendant Wood *allege* that he was not present at Fairbanks, Alaska, at the time that the price of said Gold Bar Lumber Com-

pany stock was agreed on, nor did he participate in any way in the sale of the same to the corporation. The defendant McGinn alleges that, at the time that said Gold Bar Lumber Company stock was accepted by the Fairbanks Banking Company, a corporation, for the sum of \$341949.00, he honestly and in good faith believed that said property, so accepted, was worth said amount, and has, ever since said time, believed that said [78] property, under favorable market conditions, is worth said amount. That, at the time that he became a stockholder of said corporation, he had no personal knowledge as to the value of said Gold Bar Lumber Company stock, and relied on the statements and reports made to him by people who were personally acquainted with the property and also on the report of the board of trustees, made on 16 December, 1908.

The defendant Wood, answering paragraph IX of said amended complaint, alleges that he was not in Fairbanks, Alaska, nor within the Territory of Alaska, at the time the notes and loans therein mentioned were taken over by the Fairbanks Banking Company, and that he did not participate in the sale or transfer of said notes and loans from the copartnership to the corporation in any way. That he now believes that said notes and loans set forth in said paragraph IX were then collectible and were worth the amount for which they were accepted. The defendant McGinn, answering said paragraph, alleges that when he became a stockholder of said Fairbanks Banking Company, and during the time that he was acting as attorney for said Fairbanks

Banking Company, he did not go through the loans and discounts of the bank to determine the value of said loans and discounts, nor if he had done so would he have been in a position to determine what the value of the loans and discounts was, but that he depended on the report of the officers of the institution and the report that the board of trustees made as to the loans and discounts of said bank.

And defendants, for a further and separate answer and defense, allege:

That the said E. T. Barnette, who is jointly charged with these defendants as to all the wrongs complained of in plaintiff's said amended complaint on file herein, was, during the time of all the transactions mentioned in said complaint, the president of said Fairbanks Banking Company, afterward known [79] as the Washington-Alaska Bank, and one of its directors.

That, at the time of the suspension of said bank the said E. T. Barnette was not within the Territory of Alaska, but shortly thereafter, and in the month of February, 1911, returned to Fairbanks, Alaska, and entered into negotiations with the creditors and depositors of said bank and with the then receivers of said bank, for the purpose of amicably adjusting all suits and causes of action that might exist against him on account of any of the matters and things set forth in the said amended complaint herein.

That, as a result of said negotiations and in full satisfaction of all the wrongs complained of in plaintiff's amended complaint, the said E. T. Barnette

on 18 March, 1911, executed an instrument in writing, in which he admitted his liability to the creditors and depositors of said bank and promised and agreed to pay all the depositors and creditors of said bank in full, not later than 18 November, 1914, together with interest on all amounts due to creditors and depositors from said 4 January, 1911, until paid.

That Isabelle Barnette is the wife of said E. T. Barnette and the said Isabelle Barnette was desirous of aiding her said husband in the payment of the creditors and depositors of said Washington-Alaska Bank, and to that end joined her said husband in the promise to pay all the depositors and creditors of the said Washington-Alaska Bank, on the terms above expressed.

That said promises were made on the distinct understanding and agreement that no litigation would be instituted against the said E. T. Barnette or others for or on account of any of the matters and things set forth in the amended complaint. That, for this purpose and to prevent any litigation and as security for the faithful performance of the promises made by [80] the said E. T. Barnette and Isabelle Barnette, the said Isabelle Barnette and E. T. Barnette, on 18 March, 1911, with the knowledge, consent, and approval of this Court, conveyed to the receiver of said bank, and said receiver, by order of this Court, accepted the conveyance of title to an improved plantation containing 18,723 acres, situate in the Republic of Mexico, and certain improved and income-producing business properties and lots situated in the incorporated town of Fairbanks, Ter-

ritory of Alaska, and certain large interests in valuable association placer mining claims situate in the Fairbanks Precinct, Territory of Alaska, all of which properties belonged, at the time of said conveyance, to the said E. T. Barnette and Isabelle Barnette, and are worth the sum of one million dollars, a sum greatly in excess of the unpaid debts and liabilities of said bank.

That, in said deed of said property situate in the Republic of Mexico, it is expressly provided that said receivers may sell all or any part of said land at private sale, on or after 18 November, 1914, for the purpose of raising funds with which to pay the claims of the depositors and creditors of said bank then remaining unpaid, and out of the proceeds thereof said receivers are directed to pay all the claims of depositors and creditors of said bank then remaining unpaid; and in said deed said grantors further authorize and empower said receivers to collect and receive the amount of \$226,025.00, payable 18 November 1914, in case an option given 18 November, 1909, for the purchase of forty-nine per centum thereof is exercised by this time, and to apply such sum to the payment of said debts; and said deed to property situate in the Territory of Alaska also gives said receivers power to collect and receive all the rents, royalties and profits from the property therein described and to sell said property and to apply the amounts so received in payment of said debt.

That said receiver, plaintiff herein, holds a large amount of property belonging to said bank, which

is of great value and [81] has not been converted into money, and the property so held by him and the property so conveyed to the receivers by said E. T. Barnette and Isabelle Barnette are more than sufficient to satisfy all claims, demands and obligations of whatsoever nature now existing against said Washington-Alaska Bank of Nevada.

That the then receivers of the said Washington-Alaska Bank agreed to accept, in full satisfaction of all the matters and things set forth in plaintiff's said amended complaint and sued on herein, the said premises and property of said E. T. Barnette and Isabelle Barnette, and the said E. T. Barnette and Isabelle Barnette made and executed said promises and conveyed said property in full satisfaction of all suits or causes of action then existing against him on account of any and all matters and things arising from his connection with the said Washington-Alaska Bank and in full satisfaction of all the matters and things set forth in the amended complaint herein, and the said receivers accepted and received said promises and said property in full satisfaction of all the claims and causes of action set up in said amended complaint of plaintiff herein.

And the defendants, for a further and separate answer, allege—

That, on 18 March, 1911, and for the express purpose of preventing litigation against him for and on account of the matters and things set forth in said amended complaint, and where it is alleged that the defendants herein are jointly liable with the said E. T. Barnette, the said E. T. Barnette

and Isabelle Barnette, his wife, promised and agreed to pay to all the creditors and depositors of the said Washington-Alaska Bank not later than 18 November, 1914, all sums that should then be found to be due to them, with interest on said amounts from 4 January, 1911, until paid. [82]

That, for the purpose of securing the faithful performance of said promises, the said E. T. Barnette and Isabelle Barnette, with the consent and approval of this Court, deeded and conveyed to the said receiver a valuable improved plantation, containing 18723 acres, situate in the Republic of Mexico, and certain improved and income-producing business properties and lots situate in the incorporated town of Fairbanks, Territory of Alaska, and certain large interests in valuable association placer mining claims situate in the Fairbanks Precinct, Territory of Alaska, all of which property belonged, at the time of said conveyance, to the said E. T. Barnette and Isabelle Barnette.

That, in said deed of the properties situate in the Territory of Alaska, the receiver was given power to collect and receive all rents, royalties and profits therefrom, and to apply the amount received from said properties in satisfaction of the claims of the creditors and depositors of said bank,

That these answering defendants are informed and believe and so allege that the said receiver has received as rents, royalties and profits from the said property, approximately the sum of thirty-three thousand dollars, and the value of the property held by the receiver and situate in the Territory of

Alaska, other than the said sum of thirty-three thousand dollars, is of the value of not less than twenty-five thousand dollars.

That the amounts of money and property already received by the said receivers from the estate of the said E. T. Barnette are more than ample to pay all the matters and things charged against these defendants in the amended complaint of the plaintiff herein and answering defendants allege that all the wrongs and things charged against these defendants in the said amended complaint have been fully satisfied and paid. [83]

Wherefore these answering defendants pray:

(1) That the agreement attached to plaintiff's amended complaint and marked "Exhibit 1" be reformed so as to express the true agreement of the parties, as in answering defendants' answer hereinbefore set forth.

(2) That plaintiff take nothing by this action and that the defendants recover their costs and disbursements.

(3) That these answering defendants have such other and further relief as to the Court may seem just and equitable in the premises.

JOHN L. MCGINN and

A. R. HEILIG,

Attorneys for Answering Defendants.

Territory of Alaska,

Fairbanks Precinct—ss.

John L. McGinn being first duly sworn according to law, on his oath deposes and says:

I have read the foregoing answer, know the con-

tents thereof, and believe the same to be true, and as to the matters and things alleged on information and belief I also believe the same to be true.

JOHN L. MCGINN.

Subscribed and sworn to before me, the undersigned, on this 27th day of September, A. D. one thousand nine hundred and thirteen.

[Seal]

JOHN A. CLARK,

Notary Public in and for the Territory of Alaska.

My commission expires Apr. 24, 1914.

[Endorsed]: No. 1756. In the United States District Court, Territory of Alaska, Fourth Division. Noyes, Plaintiff, vs. Jesson et al., Defendants. Answer. Filed in the District Court, Territory of Alaska, 4th Div., Sep. 29, 1913. C. C. Page, Clerk. By Angus McBride, Deputy. [84]

[Title of Court and Cause.]

Demurrer to New Matter in Separate Answer of Defendants, Wood, Healy and McGinn.

Comes now the plaintiff and demurs to the new matter set up in the separate answer of the defendants R. C. Wood, J. A. Healy and John L. McGinn as follows:

1. He demurs to said new matter set up as a further, separate and affirmative defense as a basis for reformation of contract for the reason that the same does not constitute a defense or counterclaim to plaintiff's complaint.

2. He demurs to the new matter set up in the last further and separate answer of these answering defendants, pleading that the wrongs complained of

against said defendants have been satisfied and paid in full by the rents, royalties and profits derived from the Barnette trust deed, for the reason that the same does not constitute a defense or counterclaim to plaintiff's complaint.

O. L. RIDER,

Attorney for Plaintiff.

Service of copy accepted this 2 day of October, 1913.

J. L. MCGINN &

A. R. HEILIG,

Attorneys for Defendants Wood, Healy and McGinn.

[Indorsed]: No. 1756. F. G. Noyes, Receiver, Plaintiff, vs. J. A. Jesson, et al., Defendants. Demurrer to Separate Answer of Defendants, Wood, Healy and McGinn. Filed in the District Court, Territory of Alaska, 4th Div. Oct. 2, 1913. Angus McBride, Clerk. By P. R. Wagner, Deputy. [85]

[Title of Court and Cause.]

Rulings on Demurrers.

Now on this day, the demurrers to the separate answers of the defendants John A. Clark, J. A. Jesson, Raymond Brumbaugh, E. R. Peoples, Jas. W. Hill, George Preston, R. C. Wood, J. A. Healy and John L. McGinn having previously been heard and submitted to the Court for its decision, O. L. Rider, in behalf of plaintiffs, and McGowan & Clark, and A. R. Heilig, in behalf of defendants, being present in open court; and the Court being duly and fully advised in the premises,

IT IS ORDERED, that the demurrer to the third separate answer and defense in the answer of John A. Clark is overruled, and the demurrer sustained as to the fourth separate answer and defense; that the demurrer is sustained as to the first and fourth separate answers of J. A. Jesson, Raymond Brumbaugh, E. R. Peoples and Jas. W. Hill, and overruled as to the third; sustained as to the fourth separate answer of Preston, and overruled as to the third; and sustained as to the first separate further answer of R. C. Wood, J. A. Healey and John L. McGinn, and overruled as to the last one.

F. E. FULLER,
District Judge. [86]

[Title of Court and Cause.]

**Amended Answer of Defendants John A. Jesson,
Raymond Brumbaugh, E. R. Peoples, James W.
Hill, John A. Clark, and George Preston.**

Comes now the defendants, John A. Jesson, Raymond Brumbaugh, E. R. Peoples, James W. Hill, John A. Clark and George Preston, and by leave of Court first had and obtained, file the following as their amended answer to the amended complaint on file herein, and admit, deny and allege as follows, to wit:

Allege that the terms of service of these defendants were not concurrent, save and except that the defendant John A. Jesson was a director of said bank at all the times between March 12, 1908, and the time of the suspension of said bank on January 4, 1911, and the terms of office of the other defendants, ap-

pearing herein, covered various periods during said time of service of said John A. Jesson, the terms of office of said other answering defendants being as follows, to wit:

James W. Hill, from September 12, 1908, to September 12, 1909; E. R. People from Sept. 12, 1908, to April 24, 1909; Raymond Brumbaugh, from March 13, 1909, to September 12, 1910; John A. Clark from May 12, 1910, to January 4, 1911; George Preston, from September 12, 1910, to December, 1910; and said defendants above named whose terms of officer were not coextensive with the terms of said John A. Jesson, have not sufficient information, knowledge or belief as to the matters charged against the directors at the periods when said answering defendants were not directors, to enable them to admit or deny the allegations of said amended complaint, from personal knowledge, and all of said answering [87] defendants, with the exception of John A. Jesson, basing their denials upon such lack of information, knowledge or belief, save and except as hereinafter expressly admitted, deny each and every and all of the matters and things contained in said amended complaint, alleged to have transpired during the terms of office of the directors at the periods during which these answering defendants were not directors of said corporation; and

The defendant James W. Hill unites with the defendant John A. Jesson in his admissions and denials of all matters and things charged against the directors that are alleged to have happened during the period said James W. Hill was a director of said

bank, as above set forth; the defendant Raymond Brumbaugh united with the defendant John A. Jesson in his admissions and denials of all matters and things charged against the directors that are alleged to have transpired during the time said Raymond Brumbaugh was a director of said corporation; the defendant E. R. Peoples unites with the defendant John A. Jesson in his admissions and denials of all matters and things charged against the directors that are alleged to have transpired during the time said E. R. Peoples was a director of said corporation; the defendant John A. Clark unites with the defendant John A. Jesson in his admissions and denials of all matters and things charged against the directors that are alleged to have transpired during the time said John A. Clark was a director of said corporation; and the defendant George Preston unites with the defendant John A. Jesson in his admissions and denials of all matters and things charged against the directors that are alleged to have transpired during the time said George Preston was a director of said corporation.

Subject to the limitations and conditions last above set forth, these defendants, for an amended answer to the amended complaint on file herein, and to the acts and things alleged to have [88] been done and performed during their respective terms of office, admit, deny and allege as follows, to wit:

I.

Answering paragraph III of said amended complaint, these defendants deny that E. T. Barnette, R. C. Wood and James W. Hill, circulated, or caused to

be circulated, in the city of Fairbanks, or vicinity, or elsewhere, stock subscription lists, subscribing to the capital stock of said corporation, which said stock subscription lists, omitting the signatures, were, or are, in words and figures as set forth in paragraph III of said amended complaint.

II.

Answering paragraph IV of said amended complaint, these answering defendants admit that said E. T. Barnette signed said subscription list for four hundred forty shares of capital stock of said corporation, and that James W. Hill signed said subscription list for two hundred and twenty shares of said capital stock, but deny that the same was signed or subscribed by the said R. C. Wood for two hundred twenty shares or any shares, and deny that said James W. Hill, R. C. Wood and E. T. Barnette caused said subscription lists to be circulated or that they circulated the same.

III.

Answering paragraph V of said amended complaint, defendants deny that the first meeting of the incorporators or subscribers to the capital stock of the Fairbanks Banking Company, a corporation, was held at Fairbanks on 12 March, 1908, but allege that said first meeting of the incorporators and subscribers to the capital stock of said Fairbanks Banking Company, a corporation, was held on 8 February, 1908; deny that on 12 March, 1908, a board of twelve directors for said corporation, named or selected by said E. T. Barnette, was elected; and deny that the said E. T. Barnette named or selected said Board of

Directors, otherwise than by placing the names of said [89] persons in nomination at the meeting of the subscribers and stockholders held 8 February, 1908.

IV.

Answering paragraph VI of said amended complaint, these defendants deny that, on 13 March, 1908, said board of directors authorized the acquisition or purchase of the Fairbanks Banking Company, a copartnership, or the assets in business of said Fairbanks Banking Company, a copartnership, otherwise than as in the further, separate, and affirmative defense of these defendants hereinafter set forth. Deny, except as in the further and separate answer of these defendants hereinafter set forth, that the purchase or acquisition of the assets or business of the Fairbanks Banking Company, a copartnership, or the terms thereof, were reduced to writing in a contract signed or executed by the parties, dated 16 March, 1908, and deny that a true copy of the same is attached to the amended complaint and marked "Exhibit 1."

V.

Admit that there were issued to E. T. Barnette 260 shares of the capital stock of said corporation, but deny that the same was done in accordance with said contract marked "Exhibit 1." Admit that there were 130 shares of the capital stock of said corporation issued to James W. Hill, but deny that the same was in accordance with the contract marked "Exhibit 1," or otherwise than as hereinafter set forth in the further and separate answer of these defend-

ants. Deny that there were ever issued to R. C. Wood 130 shares of the capital stock of said Fairbanks Banking Company. Admit that the assets of said copartnership, enumerated and described in said contract "Exhibit 1," were transferred to said corporation, but deny that the same was done in accordance with said contract marked "Exhibit 1," or otherwise than as set forth in the further and separate answer of these defendants. [90]

VI.

Answering paragraph VIII of said amended complaint, these defendants deny that, at or immediately prior to the transfer of the assets of the Fairbanks Banking Company, a copartnership, to the Fairbanks Banking Company, a corporation, the capital stock of the Gold Bar Lumber Company was carried on the books of said corporation in the sum of \$248,-067.89, or a less sum than \$341,949.00. Deny that, at the date of said transfer, the value of said Gold Bar Lumber Company stock was a sum less than \$248,-067.89 or was of a less value than the sum of \$341,-949.00. Deny that said stock was transferred to and received by the said Fairbanks Banking Company, a corporation, at an arbitrarily increased or grossly fraudulent or any over-valuation of more than \$93,-881.11 or any sum whatsoever, and deny that the same or all of it was done or accomplished with the full knowledge, co-operation, or consent of all the defendants Dan Ryan, C. J. Robinson, M. H. McMullen, C. E. Claypool, Robert Shepard, Hans Stark, John Flygar, J. A. Jesson, D. H. Jonas, David Yarnall, and John P. Anderson, or of the defendants R.

C. Wood, James W. Hill, B. H. Dusenbury, and John L. McGinn; and deny that, at said time, the said R. C. Wood was the cashier of said Fairbanks Banking Company, a corporation, or that he was within the Territory of Alaska. Deny that the business of the Gold Bar Lumber Company was then, or ever since has been, or still is, of an extremely hazardous or speculative nature, and deny that the capital stock of said Gold Bar Lumber Company was not delivered to said Fairbanks Banking Company, a corporation.

VII.

Answering paragraph IX of said amended complaint, these defendants deny that the defendants R. C. Wood and John L. McGinn were then officers or directors of said corporation. Deny that, of the notes so sold or transferred to said corporation, a large amount was then past due, worthless, or uncollectible, and deny that the amount of past due, worthless, and uncollectible paper was [91] a sum in excess of \$53,000.00 or any sum; and deny that the same are still unpaid or without substantial value; and deny that the list of notes, with the amounts thereof, as set forth in paragraph IX of said amended complaint, were worthless or uncollectible, or that the same are worthless and uncollectible; deny that it was then and there well known to said defendants, directors, or officers aforesaid, or by each of them, or by the exercise of ordinary or of great care might have been so known to them or any or each of them, that the said notes listed in said paragraph IX of said amended complaint, were, at the

time that the same were accepted by or transferred to the said Fairbanks Banking Company, a corporation, past due or worthless or without substantial value.

VIII.

Answering paragraph X of said amended complaint, these defendants deny that, for the 1502 shares of the capital stock of said corporation, issued on 14 March, 1909, the same were all paid for by promissory note, but allege that some were paid for in cash. Deny that a large amount of said notes was, or still is, worthless or uncollectible, or that the same has never been paid, and deny that the amount of said worthless and uncollectible notes is of the face value of \$22,982.33, or any other sum.

IX.

Answering paragraph XI of said amended complaint, these defendants deny that there was an issued capital stock of \$202,200.00 or a greater sum than \$189,200.00. Deny that, with no other assets than those of the Fairbanks Banking Company, a copartnership, as mentioned and set forth in "Exhibit 1," added to said stock subscription notes of the face value of \$150,200.00 the Fairbanks Banking Company, a corporation, commenced business as a bank. Deny that the amounts and the assets set forth in said paragraph XI constituted [92] all of the assets of said Fairbanks Banking Company, a corporation. Deny that the sum of \$200,000.00 belonging to E. T. Barnette was an alleged special deposit, and deny that the same was not in fact deposited by said E. T. Barnette.

X.

Answering paragraph XII of said amended complaint, these defendants deny that, on 16 March, 1908, when said Fairbanks Banking Company, a corporation, commenced business, said corporation was actually insolvent in this, or otherwise, that its assets were then insufficient in value to pay its debts; but allege that in truth and in fact the assets of said corporation at said time were more than ample to pay all of its debts and obligations. Deny that the actual insolvency of said bank was then known to the directors or officers of said institution hereinabove mentioned, or that, by the exercise of great, ordinary, or other care, might have been known. Admit that said bank on 16 March, 1908, was on a script basis, but allege that all the other banks in the Fairbanks precinct, and the major portion of the banks throughout the United States, were upon the same script basis owing to the financial flurry in existence at that time.

XI.

Answering paragraph XIII of said amended complaint, these defendants deny that said bank, or the defendants mentioned in said amended complaint, or the officers, directors, and employes of said bank, at all times or any times falsely and wrongfully, or otherwise, represented or held out to the public generally, or otherwise, that said Fairbanks Banking Company, a corporation, had paid up capital stock of \$300,000.00.

XII.

Answering paragraph XIV of said amended com-

plaint, these defendants allege that they are informed and believe, and basing their denials on such information and belief, deny that John L. McGinn was a director of said bank from and including 13 September, [93] 1909, to 12 May, 1910. Deny that John L. McGinn and R. C. Wood, or either of them, continued to act as directors of said bank subsequent to the first day of May, 1910.

XIII.

Answering paragraph XVII of said amended complaint, these defendants deny that the defendant L. N. Jesson acted as an executive officer of said corporation, or as a member of the executive committee thereof, until 12 September, 1910, or any other time.

XIV.

Answering paragraph XVIII of said amended complaint, these defendants admit that at the meeting of the Board of Directors held 12 March, 1908, R. C. Wood was elected cashier of said bank, but deny that the said R. C. Wood thereupon accepted said office or entered on the duties thereof, or that he accepted said office or entered on his duties as cashier prior to 17 April, 1908. Admit that he continued to perform the duties of cashier of said Fairbanks Banking Company, a corporation, until 29 June, 1908, but allege in this connection that on 12 May, 1908, said R. C. Wood tendered his resignation to said corporation as cashier and requested to be relieved of his duties, but at the request of the Board of Directors continued to act as cashier until 29 June, 1908.

XIV.

Answering paragraph XIX of said amended complaint, these defendants deny that, shortly after the said Fairbanks Banking Company, a corporation, commenced business, said corporation wrongfully or unlawfully began to reduce its issued capital stock by accepting the surrender thereof, or giving in return therefor either cash or the stock subscription notes given for said stock; and deny that a list of said stock so surrendered, together with the dates of surrender and the number of shares surrendered and the names of the [94] parties surrendering or the amount of cash or subscription notes returned thereof, is as is set forth in the list set out in said paragraph XIX of the amended complaint. Deny that the defendant R. C. Wood ever surrendered any issued capital stock to said Fairbanks Banking Company, a corporation, and deny that he was ever the owner of the same. Deny that the defendant John L. McGinn ever sold or surrendered, or that the Fairbanks Banking Company, a corporation, ever received, any stock of the said John L. McGinn, or that said corporation ever paid the said John L. McGinn any money therefor.

Deny that, during all the times from and including said 20 June, 1908, to and including said 25 October, 1910, the liabilities of said corporation to its general creditors greatly exceeded its assets, and deny that, by accepting the surrender of its capital stock and returning, or returning, therefor cash and subscription, or subscription notes, as in said paragraph XIX alleged, the assets of said corporation to which said creditors could look for payment of their claims were

further decreased, or that the same were, in the manner or amounts aforesaid, withdrawn or divided among the said stockholders of said corporation. Deny that the surrender of said stock or the return of cash or notes, as in said paragraph set forth, were made to or by said corporation with the full knowledge consent or approval of the defendants or each of them who constituted its Board of Directors or officers, on the date set forth in said paragraph XIX, or that by the exercise of ordinary, or great, care the same could have been known to them or each of them. Deny that any stock surrendered to said corporation, after the 15th day of March, 1909, was done with the knowledge, consent, or approval of the Board of Directors of said bank, or with the knowledge, consent, or approval of the defendants.

Deny that James W. Hill was a director at any time after September 12, 1909; deny that E. R. Peoples was a director at any time after April 24, 1909; and deny that George Preston was a director at any time after December, 1910. [95]

XIV—A.

Answering paragraph XX of said amended complaint, these defendants deny that there were issued 2020 shares of the capital stock of said corporation on the 4th day of March, 1908, or a greater amount than 1892 shares, and as to whether, by reason of the surrender or cancellation of shares, as mentioned in said paragraph XIX of the said complaint, the total issued capital stock never exceeded 2156 shares, or after the 9th day of November, 1909, never exceeded 726 shares, these defendants have no knowledge or

information sufficient to form a belief, and therefore deny the same.

XIV—B.

Answering paragraph XXI of said amended complaint, these answering defendants deny the allegations therein contained, save and except that they admit that the interest was computed on the loans of the old Fairbanks Banking Company up to March 15, 1908, and that the Board of Directors on March 12, 1908, authorized and directed that the interest on the notes and discounts be so computed and be payable on or before December 31, 1908, and that the said amount was as alleged in said paragraph, and was credited on the "old bank interest account"; and admit the issuance to R. C. Wood of the certificate of deposit alleged therein; admit the withdrawal of five thousand dollars by said defendant Hill; admit the credits placed to E. T. Barnette, James W. Hill and R. C. Wood; and admit the payment of said sum to them; and admit that the money was paid from the funds of the bank regardless of whether or not it had been collected from the makers of said notes.

XIV—C.

Answering paragraph XXIII of said amended complaint, these defendants deny that John L. McGinn, on 13 September, 1909, was a director of said Fairbanks Banking Company, a corporation. Deny that said L. N. Jesson was a member of the executive committee of said corporation. Deny that, on 13 September, 1909, the said Washington-Alaska Bank of Washington had in its assets the sum of \$70040.10

[96] of loans past due, and deny that the same were at said time, or still are, without substantial value, and deny that the said Washington-Alaska Bank of Washington was carrying its real estate and fixtures at \$10,000.00 or any sum in excess of their real value; Deny that said Fairbanks Banking Company, a corporation, with the express knowledge, consent or approval of the defendants in said paragraph XXIII mentioned, the then directors or officers in said paragraph mentioned, on 13 September, 1909, or at any other time, paid to the stockholders of the Washington-Alaska Bank of Washington, for said capital stock thereof, a premium or bonus or more than \$100,000.00 or any other sum over and above the then paid in capital stock of the Washington-Alaska Bank of Washington, or over and above the actual value thereof. Deny that thereby said defendants wrongfully or fraudulently lost or dissipated more than \$100,000.00, or any sum of the funds or assets of said Fairbanks Banking Company, a corporation, or greatly, or at all, aggravated or increased its already insolvent condition, and deny that said Fairbanks Banking Company at said time was insolvent. Deny that said Fairbanks Banking Company selected and appointed the defendant R. C. Wood manager of the three banks, viz: the Fairbanks Banking Company, the Washington-Alaska Bank, or the First National Bank, and deny that the said three banks continued thereafter until on or about 12 May, 1910, to be managed or operated by the defendant R. C. Wood as manager. Deny that the same were but ostensibly managed and operated as separate

and distinct and unassociated banks, and in this connection these defendants allege that the said R. C. Wood was appointed and selected by the said Fairbanks Banking Company as an advisory manager of said three banks, with authority only to confer and consult with the officers of said Fairbanks Banking Company and said Washington-Alaska Bank. [97]

XIV—D.

Answering paragraph XXV of said amended complaint, these defendants deny that, on 10 April, 1910, the Fairbanks Banking Company, a corporation, was controlled or was in the control or management of the Washington-Alaska Bank, and allege that, at said time and prior and subsequent thereto, the affairs of the Washington-Alaska Bank were managed by its own board of directors, and that said Fairbanks Banking Company had no voice in the management of the affairs of said bank other than that of a stockholder. Deny that said Fairbanks Banking Company, a corporation, caused said Washington-Alaska Bank of Washington to declare or pay to the Fairbanks Banking Company, a corporation, a dividend of thirty-three and one-third per centum of the capital stock of said Washington-Alaska Bank of Washington, amounting to the sum of \$50,000.00, and in this connection these defendants allege that the directors of said Washington-Alaska Bank did, on said date, declare a dividend of the sum of \$50,000.00 out of its surplus and undivided profits. Deny that, at the time said dividend was declared and for a period of seven months prior thereto, the management of the Fairbanks Banking Company, a

corporation, the Washington-Alaska Bank of Washington, and the First National Bank, had been under the general management of the defendant, R. C. Wood, otherwise than as has been set forth in the *proceeding* paragraph. Admit that the amount of the surplus and undivided profits of the Washington-Alaska Bank had decreased from the sum of \$66,839.16 to \$57,169.76, but deny that said decrease was a net loss of \$9,669.40, or any amount, for seven months' operation, and defendants allege that said decrease was the result of the charging off of some bad loans. Admit that, on said day that said dividend was declared, the Washington-Alaska Bank of Washington had a capital stock of \$150,000.00 and a surplus of \$57,169.76, but deny any information or knowledge sufficient to form a belief as to whether, on said date, it had among its assets loans and discounts past due [98] without substantial value, or which had not yet been collected or can not be collected, amounting to the sum of \$76,005.35, or another amount. Admit that it had invested in a certificate of deposit of the Fairbanks Banking Company the sum of \$125,000.00 but deny that said Fairbanks Banking Company was insolvent and allege that said certificate was paid in full.

XIV—E.

Answering paragraph XXVI of said amended complaint, these defendants deny that, on 12 April, 1910, said Fairbanks Banking Company, a corporation, acting by and through its then Board of Directors, by a resolution entered on the minutes of said Fairbanks Banking Company, a corporation,

wrongfully and fraudulently declared and ordered to be paid on its then outstanding capital stock of \$168,-600 a dividend of twenty per centum, amounting to \$33,720.00.

XIV—F.

Answering paragraph XXVII of said amended complaint, these defendants deny that, on 12 April, 1910, or at, or before, the time when said dividend mentioned in the *proceeding* paragraph was ordered to be paid, the said Fairbanks Banking Company, a corporation, was, or long prior thereto had been, in a grossly insolvent or failing condition. Deny that said Fairbanks Banking Company, a corporation, had, on said 12 April, 1910, no earnings, surplus, or undivided profits on hand, out of which said dividend could legally be paid, and deny that at or prior to said date, said Fairbanks Banking Company had neither capital stock nor surplus. Deny that the Washington-Alaska Bank of Washington was a subsidiary corporation to the Fairbanks Banking Company, a corporation, and deny that the assets carried by the Fairbanks Banking Company on its books of \$75,000.00 as a premium on the capital of said Washington-Alaska Bank, had no existence whatever and that the same was purely imaginary or of no value. Deny that the said Fairbanks Banking Company, a corporation, on said 12 April, 1910, carried as an asset, at their face value, loans or discounts which were past due, or were worthless, or that have not yet [99] been paid, or that can not be collected, in a sum amounting to \$118,250.47, or any other sum. Deny that the capital stock of the

Gold Bar Lumber Company originally had been, or still was on said 12 April, 1910, fraudulently overvalued by a sum in excess of \$93,881.11 or any sum. Deny that said dividend amounting to the sum of \$33,720, was wrongfully, unlawfully, or fraudulently declared or paid by said Fairbanks Banking Company, a corporation, with the express knowledge, consent, or approval of the defendants D. H. Jonas, J. A. Jesson, John Flygar, C. J. Robinson, David Yarnell, Robert Shepard, R. Brumbaugh, John L. McGinn, R. C. Wood, J. A. Jackson, or James W. Hill, or of the defendant L. N. Jesson (and deny that said L. N. Jesson was a member of the executive committee of said corporation), or of R. C. Wood (and deny that said R. C. Wood was its general manager), out of, by, or with the funds and moneys of the depositors of said Fairbanks Banking Company, a corporation, and not by, out of, or with the surplus earnings and undivided profits of said Fairbanks Banking Company, a corporation, and as to whether, on said 12 April, 1910, said Fairbanks Banking Company, a corporation, owed to depositors the sum of \$960,689.79, these defendants have no knowledge or information sufficient to form a belief and therefore deny the same.

XIV—G.

Answering paragraph XXVIII of said amended complaint, these defendants deny that, shortly prior to 12 May, 1910, said E. T. Barnette, as president of the Fairbanks Banking Company, a corporation, and of the Washington-Alaska Bank of Washington, by and with the knowledge and consent of the then

directors and officers of said Fairbanks Banking Company, a corporation, wrongfully sold or transferred to the defendants R. C. Wood and John L. McGinn, the entire capital stock of said First National Bank, for the sum of \$125,000.00. Admit that said sale and said transfer of said stock of said First National Bank to the defendants R. C. Wood and [100] John L. McGinn was claimed to have been made under and pursuant to an option, claimed to have been given to the defendant Wood at the time said stock was purchased by said Fairbanks Banking Company, a corporation, and the said Washington-Alaska Bank of Washington, but deny that said option was entered into without consideration and was void and allege that said option did in fact exist. Deny that the capital stock of said First National Bank was carried by the said Fairbanks Banking Company, a corporation, for any entire year, without any interest or profit paid or received by said Fairbanks Banking Company, a corporation, and solely, or solely, for the use, benefit and profit of said defendants R. C. Wood and John L. McGinn, and deny that the same was due, suffered, or permitted by and with the knowledge, consent, or approval of all the then directors and officers of the said Fairbanks Banking Company, a corporation, and deny that, by said act, the said Fairbanks Banking Company, a corporation, was damaged in a large sum, to wit, in a sum in excess of \$25,000.00 or any sum.

XIV—H.

Answering paragraph XXIX of said amended

complaint, these defendants deny that, on 12 May, 1910, and long prior thereto, the said R. C. Wood and John L. McGinn had full or complete knowledge, or means of knowledge, of the grossly insolvent and failing condition of said Fairbanks Banking Company, a corporation, and deny that, at said time, said Fairbanks Banking Company, a corporation, was in a grossly insolvent or failing condition. Admit that they knew that said E. T. Barnette had not, at said time, withdrawn his deposit of \$200,000.00. Deny that said R. C. Wood and John L. McGinn then or there knew that said E. T. Barnette was likewise aware of the said insolvent or failing condition of said Fairbanks Banking Company, a corporation, and deny that said Fairbanks Banking Company, a corporation, was insolvent or in a failing condition. Deny that said Wood and McGinn knew that said Barnette could or would shortly withdraw in cash the whole of said alleged special deposit of two hundred [101] thousand dollars. As to whether said E. T. Barnette did actually withdraw, within sixty days after 12 May, 1910, said sum of two hundred thousand dollars, these defendants have no knowledge or information sufficient to form a belief and therefore deny the same. As to whether said E. T. Barnette, by withdrawing said sum of two hundred thousand dollars, thereby preferred himself as a creditor of said Fairbanks Banking Company, a corporation, these defendants allege that they are without sufficient legal knowledge or information sufficient to form a belief and therefore deny the same, and as to whether the withdrawal of said money and

all of the things alleged in said paragraph XXIX of plaintiff's amended complaint were done with the knowledge, consent and approval of the then Board of Directors and officers of said Fairbanks Banking Company, a corporation, these defendants have no knowledge or information sufficient to form a belief and therefore deny the same.

XV.

Answering the allegations of paragraph XXX of said amended complaint, these answering defendants admit the consolidation of the Fairbanks Banking Company and the Washington-Alaska Bank, in the manner therein set forth, but allege that they have no knowledge or information as to the amount due to the depositors at the time of said consolidation, as therein alleged, and, by reason of their lack of information and belief in the matter, deny that there was owing to the said depositors the sum of \$947,-800.29.

Further answering the allegations of said paragraph XXX these answering defendants deny that said Washington-Alaska Bank of Washington had no divided profits on hand at the time of said consolidation, and avers that, as they are informed and believe, and therefore so allege on such information and belief, the said Washington-Alaska Bank of Washington had on hand undivided profits in the sum of \$4,658.92; that answering defendants are informed and believe and basing their denial on such information and belief, deny that the capital stock of the said Washington-Alaska Bank of Washington [102] was seriously impaired, or impaired in any

way, as alleged in said paragraph, or at all; deny that said bank had on hand at said time loans and discounts in the sum of \$100,704.98, which were bad, worthless and uncollectible, and have not been paid, or that were bad, or worthless, or uncollectible; allege that they have no information or belief as to whether the loans referred to in said paragraph were carried on the books of the Washington-Alaska Bank of Washington, at their face value or at their present worth, and allege that they have no information or knowledge as to whether said notes have been paid, but are informed and believe that a portion of said notes has since been paid, and basing their denial on such information and belief and lack of information, deny that the notes of the face value of \$100,707.98, carried by the Washington-Alaska Bank of Washington on its books on the 1st day of October, 1910, have not been paid; deny that, on the 1st day of October, 1910, or at any other time alleged in plaintiff's amended complaint, the directors of the Fairbanks Banking Company knew that notes, of the value of \$100,704.98, carried on the books of the Washington-Alaska Bank of Washington were worthless, or bad, or uncollectible, or that any material portion thereof was so worthless, or bad, or uncollectible; admit that, after said consolidation, said Fairbanks Banking Company, a corporation, continued to carry on and conduct a banking business at the town of Fairbanks as formerly, but under the name of the Washington-Alaska Bank, and deny that, at all times after the first day of October, 1910, or at any time after said 1st day of October, 1910,

said directors, wrongfully, fraudulently, and without right, or wrongfully or fraudulently, or without right, carried on the books of the said Washington-Alaska Bank, as a book asset, the item "Premium Washington-Alaska Bank stock \$75,000.00"; admit that said item was carried on the books, as therein set forth, but deny that said asset had no existence whatsoever, so that the same was purely imaginary, false, and fraudulent, or imaginary, or false, or fraudulent.

XVI.

Answering the allegations of paragraph XXXI of said amended complaint, these answering defendants admit that, subsequent to [103] the 1st day of October, 1910, and up to and including the 4th day of January, 1911, the Washington-Alaska Bank, formerly the Fairbanks Banking Company, continued actively in business as a bank and received deposits from the public generally, but deny that said bank was, during said time, insolvent and in a failing condition or insolvent, or in a failing condition, as alleged in said paragraph; admit the institution of the action entitled Tanana Valley Railroad Company, a corporation, and John Zug, plaintiffs, vs. Washington-Alaska Bank, the appointment of F. W. Hawkins as receiver; that he thereafter qualified and entered upon his duties on the 5th day of January, 1911, and that thereafter on January 6, 1911, said District Court, by order duly entered, appointed E. H. Mack jointly with said Hawkins, receiver of said Washington-Alaska Bank, and that said Mack thereupon duly qualified and entered upon the discharge

of his duties as such receiver, and that said Hawkins and Mack thereafter continued to act as joint receivers of said Washington-Alaska Bank until the 12th day of May, 1911, admit their resignation on the 12th day of May, 1911, and admit the appointment of F. G. Noyes as receiver of said Washington-Alaska Bank, but deny each and every other matter and thing therein contained, and specifically deny the allegations therein contained that "said F. G. Noyes thereupon duly qualified as such receiver and ever since has been and now is the duly qualified and acting receiver of Washington-Alaska Bank."

XVII.

Answering the allegations of paragraph XXXII, these answering defendants aver that they have no knowledge or information as to the exact amount of the liabilities of said Washington-Alaska Bank on the 4th day of January, 1911, as alleged in said paragraph, but deny that the assets of said Washington-Alaska Bank were, by reason of wrongful, fraudulent, and negligent acts of these answering defendants, or of the Board of Directors of which these defendants were members, rendered insufficient to pay said liabilities in full, and deny that the assets of said bank were impaired, injured, or rendered insufficient to pay the liabilities of said bank, by reason [104] of any act or thing done by these answering defendants, or their codirectors during the times these defendants were members, respectively, of said Board of Directors.

XVIII.

Answering the allegations of paragraph XXXIII

of plaintiff's said amended complaint, these answering defendants deny that the receivers have reduced to cash as far as possible the assets of the Washington-Alaska Bank; admit that there have been paid on the acknowledged and proven liabilities of the bank, dividends aggregating fifty per centum, and answering defendants allege that they have no knowledge or information as to whether or not \$12,-627.70 of said dividends have either not been called for or have been withheld by order of Court; and answering defendants are informed and believe, and therefore so allege, that a portion of the claim of the Dexter Horton National Bank of Seattle has been paid, and basing their denial on such information and belief, deny that there is due or owing to said Dexter Horton National Bank of Seattle, the sum of \$128,899.37, but allege that they have no knowledge of how much is due to said bank; answering defendants further allege that they have no information as to whether creditors to the amount of \$4,132.62 have failed to prove their claims or have not demanded dividends.

XIX.

Answering the allegations of paragraph XXXIV, these answering defendants admit that, on the 4th day of January, 1911, there was due and owing to the Dexter Horton National Bank of Seattle a large sum of money, the exact amount of which is to these answering defendants unknown, and admit the remainder of said paragraph.

XX.

Answering the allegations of paragraph XXXV

of plaintiff's amended complaint, these answering defendants deny that the stock [105] of the Gold Bar Lumber Company belonging to the Washington-Alaska Bank, a corporation, is subject to any claims of the Dexter Horton National Bank of Seattle, other than its claim as a general creditor against the same, and allege that they have no information or belief as to whether or not F. G. Noyes as receiver of the Washington-Alaska Bank, has made efforts to sell said stock, or that he has been unable to obtain for said stock an offer in excess of the claim of said Dexter Horton National Bank, or any other sum whatsoever; so neither admit nor deny said allegation; answering defendants are informed and believe, and basing their denial on such information and belief, deny that the stock of the Gold Bar Lumber Company has no value in excess of the claim of the Dexter Horton National Bank of Seattle, and deny that any valuation in excess of said sum is wholly uncertain and speculative.

XXI.

Answering the allegations of paragraph XXXVI of plaintiff's amended complaint, these answering defendants allege that they have no exact information or knowledge as to the character and amount of the assets of said bank now in the hands of the receiver, other than the Gold Bar Lumber Company stock, as alleged in said paragraph, sufficient to form a belief, and expressly deny that there are not now in the hands of the receiver, and were not in the hands of said receiver at the time of the filing of said complaint, other assets than the assets set forth

in said paragraph, available for the purpose of paying the creditors of said bank.

Answering the allegation that bills, notes, and overdrafts of the face value of \$266,020.31, are not of that value, these answering defendants allege that they have no information or knowledge sufficient to form a belief as to said matters, and basing their denial upon such lack of information and belief, deny the same. Deny that only \$80,000.00 thereof is owing from solvent debtors and can be collected, and deny that the balance thereof is bad, worthless, and uncollectible, or bad, or worthless, or uncollectible. Answering defendants [106] allege that they have no knowledge as to the actual cash or market value of the real estate, furniture and fixtures sufficient to form a belief in order to enable them to admit or deny the same.

XXII.

Answering the allegations of paragraph XXXVII of plaintiff's said amended complaint, these defendants deny the matters and things therein set forth.

XXIII.

Answering the allegations of paragraph XXXVIII of said amended complaint, these answering defendants deny each and every matter and thing therein contained.

XXIV.

Answering the allegations of paragraph XXXIX of plaintiff's said amended complaint, these answering defendants deny each and every matter and thing therein contained.

James W. Hill expressly denies that he was a di-

rector of said bank at any time after the 12th day of September, 1909, and alleges that he resigned as such director on or about the 12th of September, 1909, and left the Territory of Alaska about the 19th day of September, 1909, and did not return thereto until after the suspension of said bank, and did not participate in any meeting of any of said directors after his said resignation.

E. R. Peoples, particularly answering paragraph XXII of said amended complaint relating to the purchase of the Washington-Alaska Bank alleges that he did not participate in said purchase and that he was not a director and was not present at the meeting of the Board of Directors when said purchase was made, and that his resignation as such director had been sent in on the 24th of April, 1909, to the secretary of said bank, and that at said time he sold his stock and was no longer a director and did not participate in any meeting of said directors thereafter.

For a further, first and separate affirmative answer and by way of a defense, these answering defendants allege as follows, to wit: [107]

That at all the times mentioned in plaintiff's amended complaint, to wit, from the time of the organization of the Fairbanks Banking Company, a corporation, under the laws of the State of Nevada, in the month of March, 1908, up to and including the 4th day of January, 1911, E. T. Barnette was a member of the Board of Directors and president of said corporation, was the active head thereof, and was at

all times thoroughly conversant with the affairs of said bank.

That one of the principal assets of said bank, to wit, three-fourths of the capital stock of the Gold Bar Lumber Company, a corporation organized under the laws of the State of Washington, was carried on the books of the bank at a sum of \$341,941.00, and was purchased by the Fairbanks Banking Company, a copartnership, consisting of E. T. Barnette, R. C. Wood, and James W. Hill, and was, as these answering defendants are informed and believe and so allege, purchased by said E. T. Barnette for said copartnership, and he was at all times familiar with the affairs of said corporation known as the Gold Bar Lumber Company, and with the value of its properties, the extent and variety of its assets and the amount of its liabilities, and knew the value of said stock.

That during the greater part of the time that said E. T. Barnette was a director of said corporation and president thereof, he was actively engaged in mining in the Fairbanks precinct in the Territory of Alaska, and was familiar with the financial standing and moral responsibility of the majority of men who were carrying on mining operations or engaged in business in said Fairbanks district, and as answering defendants are informed and believe, and so allege, passed on and gave his judgment on most of the loans that were made during the time that he was president of said bank while in the Territory of Alaska. [108]

That with the exception of two other directors,

said E. T. Barnette is the only director who was a director from the time of the organization of said bank until its close, and he was, at all times during the existence of said banking corporation, recognized by the public at large as a man of wealth, and these answering defendants are informed and believe and so allege, that a great deal of the business of said bank was acquired by, through, and by reason of the personal friendship between depositors and other persons doing business with said bank and the said E. T. Barnette, and that he alone of all the directors, answering defendants here, had personally visited the properties of the Gold Bar Lumber Company and had first-hand knowledge and information as to their value and the condition thereof.

That none of the other directors of said bank were paid any salary, and all the other directors were men engaged in other lines of business and who served as directors more from a sense of duty than for gain. That said E. T. Barnette was the only one who was in a position to devote any considerable portion of his time to the affairs of said bank, and the said E. T. Barnette had an office in said bank, and the officers and employees of said bank were subject to receive orders from him, within the limits prescribed by the by-laws of said banking corporation, and all the books, records, loans, notes, and discounts of said bank were readily accessible to him, and all the affairs of said bank were by him thoroughly understood.

That at the time of the suspension of said bank, the said E. T. Barnette was not in the Territory of

Alaska, but was in the State of California, and after the suspension of said bank and about the month of February, 1911, and long prior to the commencement of this action, after he had been advised that said bank had been suspended and receivers appointed therefor, the said E. T. Barnette voluntarily returned to Fairbanks, and entered into negotiations with the then receivers of said bank with the purpose of arranging for [109] the payment of any indebtedness that might remain due to the creditors of said bank after the assets of said bank had been realized on, and to that end he proposed to said receivers that he would deposit with them income-bearing and other properties greatly in excess of the amount that would be required to satisfy and pay all sums that would remain due to the creditors of said bank after the collection of the notes due to said bank and the realizing by said receivers on the assets of said bank other than notes and mortgages, and at said time said E. T. Barnette submitted a proposition in writing to said receivers, wherein he acknowledged that he himself was liable for any irregularities that might have occurred in the management of said bank and for any loss that had been sustained by reason of any of the acts and things that are in plaintiff's said amended complaint alleged to have been performed and done by the directors and officers of said bank, and the said E. T. Barnette then and there promised and agreed to pay all sums that might be necessary to be paid in order to settle the claims of the creditors in full, together with interest on said indebtedness at the rate of six per cent per annum

from the time of the suspension of said bank.

That by reason of said offer and on or about the 18th day of March, 1911, said E. T. Barnette executed and delivered to said receivers of said bank an instrument in writing, termed and designated a trust deed, wherein he acknowledged his liability for the payment of the amounts due to the depositors and holders of unpaid drafts issued by said bank, as well as any other indebtedness of said bank for which he might be liable, by reason of any mismanagement on his part as president and one of the directors of said corporation, which said deed conveyed to said receivers and their successors in interest, in trust for the purposes therein specified, certain improved rural property situate in the Republic of Mexico, certified copy of which deed is now in the possession of the plaintiff in the above-entitled action, and to which reference is hereby specifically made for more particular description thereof. [110]

That, at said time and place, the said E. T. Barnette and Isabelle Barnette, his wife, executed and delivered to said receivers a trust deed conveying all the real property of every nature and description situate in the Fairbanks precinct, Territory of Alaska, to which said E. T. Barnette and Isabelle Barnette, had title, which said property consisted in income-producing mining claims and income-producing town property situate in the town of Fairbanks, Territory of Alaska, which said deed was in the same form as the trust deed last hereinabove referred to, save and except that it was provided therein that all

moneys derived as rentals from any of the said town property and as royalties from said mining claims should be collected by said receivers and disbursed and paid out to the creditors of said bank at any time on the orders of the district court.

That said Isabelle Barnette was never at any time a director of said bank or in any way liable for any of its said indebtedness and she joined in said transfer and in said petition to the Court to accept said trust deeds by reason of the love and affection she bore for her said husband and to assist him in paying his indebtedness of said bank.

That as these answering defendants are informed and believe and so allege, said deeds were delivered for the express purpose of securing the payment not only of the depositors and the holders of the unpaid drafts, but also all other indebtedness of every nature and description owing by said bank at the time of its suspension, together with interest at the rate of six per centum per annum from the time of its said suspension.

That the said E. T. Barnette, in said instrument, agreed as promised to pay said depositors and holders of unpaid drafts in full for all sums due to them, with interest as aforesaid, not later than the eighteenth day of November, 1914.

That thereafter the Judge of the District Court for the Fourth Judicial Division of the Territory of Alaska referred said [111] application to the receivers for their consideration, and they thereafter, after considering said proposition and taking up the matter with the attorney for said receivers, ap-

pointed by the Court, petitioned the Court for leave to accept said securities, subject to the terms and conditions therein specified, for the uses and purposes therein set forth.

That thereafter the Judge of the District Court for the Fourth Judicial Division of the Territory of Alaska in writing authorized and directed said receivers to receive the said deeds and to enter into possession of the properties situate in the Fairbanks precinct, subject to the terms and conditions set forth in said written proposition of said E. T. Barnette and Isabelle Barnette and the terms and conditions of said trust agreement.

That these answering defendants are informed and believe and so allege that, at the time said proposition was made by said E. T. Barnette and Isabelle Barnette, his wife, the attorneys for the receivers of said bank had prepared a complaint against said E. T. Barnette and some of the other directors of said bank, charging the said E. T. Barnette and said other directors with most, if not all, the alleged wrongful acts contained in plaintiff's amended complaint herein, together with other alleged wrongful acts, and was about to file said complaint with the Court and serve said defendants, for the purpose of recovering from the said E. T. Barnette and other directors of said bank any damages that might have been sustained by the said bank by reason of the said alleged wrongful acts of said E. T. Barnette and the said other directors.

That when said deeds were executed by the said E. T. Barnette and Isabelle Barnette, and were

ordered by said Court to be accepted by the said receivers, it was understood by the said receivers, by the attorney for said receivers, and by said E. T. Barnette that the execution of said deeds, and the delivery thereof, and their acceptance by the said receivers was to be in full settlement of [112] all claims of every nature and description that might then exist against said E. T. Barnette and the other directors by reason of or because of any of the acts and things done and performed by the said directors, including the said E. T. Barnette, during the time of his incumbency in office, and these answering defendants are informed and believe and so allege that said deeds were so accepted as a full release and discharge of all liability of said E. T. Barnette and his codirectors, for any and all alleged wrongful acts and things done or performed from the time of the organization of said corporation, the Washington-Alaska Bank, formerly the Fairbanks Banking Company, until the time of its suspension.

That immediately after the execution of said instrument, as these answering defendants are informed and believe and so allege, said receivers entered into possession of the real property so deeded to them by said E. T. Barnette and Isabelle Barnette, and proceeded to collect all rentals due and to receive all royalties that thereafter became due to said E. T. Barnette from any of the mining claims by him deeded to said receivers, and received and collected all moneys that were due to said Isabelle Barnette as rentals from any of the properties deeded by her to said receivers, and as these answering de-

fendants are informed and believe and so allege said receivers and their successors in interest, to wit, plaintiff in this action, have received from the rentals of the properties as deeded to them and as royalties from the mining claims deeded to them a large sum of money, to wit, upwards of thirty thousand dollars, which said money is now in the possession of said receiver, plaintiff in this action, and subject to be distributed to the creditors of said banking corporation now in the hands of said receiver.

That in said deeds of E. T. Barnette and Isabelle Barnette to the properties in the Fairbanks district, it was also provided that any of said property could be sold at any time on the agreement of [113] said E. T. Barnette and Isabelle Barnette and the said receivers, and as these defendants are informed and believe and so allege, certain property so covered by said transfer has in fact been sold by the receiver and said E. T. Barnette, under and by virtue of the terms of said agreement, and the moneys realized from the sale thereof have been delivered to the receiver, plaintiff in this action, and are now in his hands.

That the properties conveyed by said E. T. Barnette and Isabelle Barnette consisted in improved and income-producing properties, the last situated in the business section of the town of Fairbanks, Alaska, the rental of which is unknown to these answering defendants, but which they are informed and believe and so allege amounts to approximately six hundred dollars a month, and all the property conveyed, did at the time of said conveyance belong to said E. T. Barnette and Isabelle Barnette, and is, as these

answering defendants are informed and believe and so allege worth the sum of not less than one million dollars, and the said sum is greatly in excess of the debts and unpaid liabilities of said bank and was greatly in excess thereof at the time of the institution of this action.

That these answering defendants, are informed and believe and so allege that said deeds were accepted in full accord and satisfaction of all liabilities of said E. T. Barnette as president and director of said bank, from the time of its organization until its suspension, and of his codefendants during the several periods of their incumbency during the periods last above set forth, and was made for the express purpose of preventing the wasting and dissipating of the assets of said corporation in the prosecution of suits for the purpose of attempting to enforce said alleged liability against said directors, including said E. T. Barnette, and against said E. T. Barnette as president of said bank, and was in full accord and satisfaction of all acts and things done and performed by all officers of said bank other than the directors thereof. [114]

That said trust as these answering defendants are informed and believe and so allege has been partially executed and in the event that said receiver has not realized sufficient moneys on the assets of said corporation before the 18th day of November, 1914, to pay all the indebtedness of said corporation, the said E. T. Barnette will pay said remaining indebtedness or will permit said properties deeded in trust, to be sold and the entire proceeds, or so much thereof as

may be necessary, applied in full satisfaction of all outstanding indebtedness and liabilities of said bank, together with interest at the rate of six per centum per annum from the time of the suspension of said bank until said indebtedness is paid in full.

That, as these answering defendants are informed and believe and so allege, at the time of the execution of said trust deeds and the time of the delivery thereof to said receivers, practically the only indebtedness of said bank, other than the indebtedness due to said depositors and the holders of unpaid drafts, was certain claim due to the Dexter Horton National Bank of Seattle, State of Washington, in a sum in excess of one hundred twenty thousand dollars, but that said claim was supposed to be secured by reason that said Dexter Horton National Bank had in its possession, and was claiming that it held as security, all the stock of the Gold Bar Lumber Company belonging to the Washington-Alaska Bank, which said stock was then and there recognized by said receivers and the attorney for said receivers and the Court as being of a value greater than sufficient to pay said claim of said Dexter Horton National Bank, and that, if said stock was held as collateral security for said loan, if said pledge was foreclosed, and the said stock of the Gold Bar Lumber Company sold, it would more than pay the indebtedness due to the said Dexter Horton National Bank, and by reason thereof, no reference was made in said trust deed to the indebtedness, other than the indebtedness due to the depositors and to the holders of unpaid drafts.

[115]

That, after the delivery of said trust deeds as aforesaid, the then receivers of said bank abandoned all idea of instituting a suit against said E. T. Barnette or any other directors of said bank, and a suit was instituted by them during the time that they were in office, and it was not until the present receiver, plaintiff in this action, was appointed, that any suits or actions were instituted, and when this action was instituted said E. T. Barnette was not joined as a party defendant and no attempt was made to hold him liable for any of the alleged malfeasances in office.

That since the time of the institution of said action, the said E. T. Barnette has twice at least and for protracted periods been within the Territory of Alaska, and within the jurisdiction of this court and could have been served with process.

That by reason of the acceptance of said deeds by said receivers, the execution thereof, and the receipt of income from the improved income-bearing properties, all of which was, as these answering defendants are informed and believe, and so allege, accepted in full accord and satisfaction of all alleged wrongful acts performed by said E. T. Barnette and other directors of said bank, including these answering defendants, and by reason of the release of said E. T. Barnette as a joint tortfeasor, these answering defendants are released from all liability of every nature and description whatsoever under and by reason of or by virtue of any of the acts or things done or performed while a director of said Fairbanks Banking Company, afterward Washington-Alaska

Bank, as alleged in the said amended complaint of plaintiff herein, or otherwise.

For a further, second separate affirmative answer and by way of defense, these answering defendants allege as follows, to wit:

That these answering defendants do not admit any liability for any act or thing charged against them in plaintiff's said amended complaint, but allege that, during the whole time that these answering defendants were directors of said bank, said E. T. Barnette was likewise a director and was the president of said bank. [116]

That subsequent to the closing of said bank and prior to the institution of this action, said E. T. Barnette and Isabelle Barnette, his wife, for the purpose of settling any liability of said E. T. Barnette and these answering defendants by reason of, or under or by virtue of any acts or things done or performed by said E. T. Barnette or the Board of Directors of said bank, or by these answering defendants during the time that they were directors of said bank, executed and delivered to the receivers of said bank a deed to certain income-producing properties situate in the town of Fairbanks, Alaska, and on the creeks adjacent thereto in the Fairbanks precinct, and paid to them certain moneys from the sale of said properties in the town of Fairbanks, and said receivers have, since said time been paid as rents and the royalties from said properties the sum of more than thirty thousand dollars, as defendants are informed and believe and so allege, which said sum was paid by said E. T. Barnette for the purpose of

settling the alleged liability of these answering defendants and his codirectors by reason of any acts or things done or alleged in plaintiff's said amended complaint to have been wrongfully done by them during the time they were directors of said bank.

That answering defendant, John A. Jesson, alleges that the liability for any of the alleged acts as set forth in said amended complaint as having been done and performed by the directors of said bank during the time he was a director thereof does not exceed the sum of thirty thousand dollars and the sum so paid by E. T. Barnette and Isabelle Barnette, as hereinbefore set forth, was paid, as said defendant is informed and believes, and so alleges, for the purpose of discharging and settling in full any and all liability against this defendant if any exists.

That answering defendant E. R. Peoples alleges that the liability for any of the alleged acts as set forth in said amended [117] complaint as having been done and performed by the directors of said bank during the time he was a director thereof does not exceed the sum of thirty thousand dollars, and the sum so paid by E. T. Barnette and Isabelle Barnette, as hereinbefore set forth was paid, as said defendant is informed and believes, and so alleges, for the purpose of discharging and settling in full any and all liability against this defendant if any exists.

That answering defendant Raymond Brumbaugh alleges that the liability for any of the alleged acts as set forth in said amended complaint as having been done and performed by the directors of said

bank during the time he was a director thereof does not exceed the sum of thirty thousand dollars, and the sum so paid by E. T. Barnette and Isabelle Barnette, as hereinbefore set forth, was paid, as said defendant is informed and believes and so alleges, for the purpose of discharging and settling in full any and all liability against this defendant, if any exists.

That answering defendant John A. Clark alleges that the liability for any of the alleged acts as set forth in said amended complaint as having been done and performed by the directors of said bank during the time he was director thereof does not exceed the sum of thirty thousand dollars, and the sum so paid by E. T. Barnette and Isabelle Barnette, as hereinbefore set forth, was paid, as said defendant is informed and believes and so alleges, for the purpose of discharging and settling in full any and all liability against this defendant, if any exists.

That answering defendant George Preston alleges that the liability for any of the alleged acts as set forth in said amended complaint as having been done and performed by the directors of said bank during the time he was a director thereof does not exceed the sum of thirty thousand dollars, and the sum so paid by E. T. Barnette and Isabelle Barnette, as hereinbefore set forth, was paid, as said defendant is informed and believes and so alleges, for the purpose of discharging and settling in full any and all liability against this defendant in any exists. [118]

That by reason of the payment in full of all sums

with which these answering defendants could be charged, as set forth in plaintiff's said amended complaint herein, these defendants are discharged from any and all liability and any and all damage occasioned to said bank by reason of any of the alleged wrongful acts and things done and performed by these defendants while a director, and said liability, if any exists, has been paid and settled in full by said E. T. Barnette, who is jointly responsible therefor.

WHEREFORE these answering defendants pray that the plaintiff take nothing by his amended complaint and that they have judgment for their costs incurred herein.

McGOWAN & CLARK,
Attorneys for Defendants.

A. R. HEILIG,
Of Counsel for E. R. Peoples.

United States of America,
Territory of Alaska,—ss.

John A. Clark, George Preston and E. R. Peoples, being first duly sworn, on oath depose and say, each for himself and not one for the other: I am one of the defendants making the foregoing amended answer, and make this verification in behalf of myself and my codefendants; that I have read same, know the contents thereof and the statements therein made are true as I verily believe.

JOHN A. CLARK.
GEORGE PRESTON.
E. R. PEOPLES.

Subscribed and sworn to before me this April 21, 1914.

[Seal]

ESTELLE FITTS,

Notary Public in and for the Territory of Alaska.

My commission expires Dec. 23, 1917.

Due service of the within amended answer and receipt of a copy thereof are hereby acknowledged this 21st day of April, 1914.

O. L. RIDER,

Attorney for Plaintiff. [119]

[Endorsed]: No. 1756. In the United States District Court, Territory of Alaska, Fourth Division. F. G. Noyes, Receiver, etc., Plaintiff, vs. John A. Jesson, et al., Defendants. Amended Answer of Defendants John A. Jesson, Raymond Brumbaugh, E. R. Peoples, James W. Hill, John A. Clark, and Geo. Preston. Filed in the District Court, Territory of Alaska, 4th Div. Apr. 21, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [120]

[Title of Court and Cause.]

Reply to Separate Answer of R. C. Wood, J. A. Healey and John L. McGinn.

Comes now the plaintiff and for reply to the last further and separate answer set up in the separate answer of the defendants R. C. Wood, J. A. Healey and John L. McGinn, heretofore filed herein on the 29th day of September, 1913, and says that he denies each and every statement and allegation contained therein, except as hereinafter admitted:

He admits that there was deeded and conveyed to the former receivers herein the property situate in the Republic of Mexico and in Fairbanks Precinct,

Territory of Alaska, and in the incorporated town of Fairbanks, Alaska, therein referred to;

He admits that in said deed of the properties situate in the Territory of Alaska the receiver was given power to collect and receive all rents, royalties and profits therefrom, and he alleges that by the terms of said deed, after deducting reasonable charges for the collection of said rents, royalties and profits and the payment of taxes assessed thereon, insurance and other legitimate expenses connected with the management of said property, the said receivers shall return to this Court and its receivers the net amount of such rents, issues and profits, the same to be disbursed by said Court through its receivers *pro rata* to the depositors and owners of unpaid drafts heretofore issued by said bank, in settlement of any deficit ascertained to exist between the amounts due such depositors and owners of unpaid drafts from said bank on the fifth day of January, 1911, [121] together with six per cent interest thereon from said date and the amount realized out of the property and assets of said bank; and this plaintiff further alleges that the net amount of such rents, issues and profits up to April 1st, 1914, is approximately \$30,458.90, less such reasonable charge as may be allowed for the collection thereof.

This plaintiff further alleges that said deed is in writing and expresses for itself the terms and conditions thereof, the uses and purposes for which it was executed and delivered, and the admissions, agreements and assumed obligations of the said Barnette and his said wife, and this plaintiff has

no knowledge nor information concerning said matters beyond the expressed terms of said deed.

O. L. RIDER,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

F. G. Noyes, being first duly sworn, deposes and says: I am the plaintiff named in the foregoing reply; I have read said reply, know the contents thereof and believe the same to be true.

F. G. NOYES.

Subscribed and sworn to before me this 21st day April, 1914.

[Seal] W. F. WHITELY,
Notary Public in and for the Territory of Alaska.

My commission expires Aug. 19, 1916.

Service of copy accepted this 21st day of April, 1914.

JOHN L. MCGINN,
Of Attorney for Defendants.

[Indorsed]: No. 1756. In the District Court for the Territory of Alaska, Fourth Division. F. G. Noyes, Receiver of the Washington-Alaska Bank, a Corporation, Plaintiff, vs. J. A. Jesson et al., Defendants. Reply to Separate Answer of R. C. Wood, J. A. Healey and John L. McGinn. Filed in the District Court, Territory of Alaska, 4th Div. Apr. 21, 1914. Angus McBride, Clerk. [122]

[Title of Court and Cause.]

Motion to Strike Portions of Paragraph 16 of the Amended Answer of the Defendants John A. Jesson, Raymond Brumbaugh, E. R. Peoples, James W. Hill, John A. Clark, and George Preston.

Comes now the plaintiff and moves the Court to strike from paragraph sixteen of the amended answer of the above-named defendants, the following, to wit:

“But deny each and every other matter and thing therein contained, and specifically deny the allegations therein contained that ‘said F. G. Noyes thereupon duly qualified as such receiver, and ever since has been and now is the duly qualified and acting receiver of the Washington-Alaska Bank,’ ” for the following reasons to wit:

1st. Because the same is irrelevant and redundant;

2d. Because the issues on said paragraph have been fully joined, before the filing of said amended answer, upon the amended petition and separate verified answers of said defendants, and in said separate verified answers the matters above referred to as denied were expressly admitted:

3d. Because said amended answer containing the denial above referred to was not filed until the day the aforesaid cause was to come on for trial:

4th. Because the question of whether or not F. G. Noyes ever duly qualified as Receiver cannot be inter-

posed as a defense to this action.

O. L. RIDER,

Attorney for Receiver.

Service of copy accepted this 22d day of April,
1914.

McGOWAN & CLARK and

A. R. HEILIG,

Attorney for Defendants. [123]

[Indorsed]: No. 1756. In the District Court for the Territory of Alaska, Fourth Division. F. G. Noyes, Receiver of the Washington-Alaska Bank, a Corporation, Plaintiff, vs. J. A. Jesson et al., Defendants. Motion to Strike Portions of Paragraph 16 of the Amended Answer of Defendants, John A. Jesson, Raymond Brumbaugh, E. R. Peoples, James W. Hill, John A. Clark and George Preston. Filed in the District Court, Territory of Alaska, 4th Div. Apr. 22, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [124]

[Title of Court and Cause.]

**Order Allowing Motion to Strike Portions of
Paragraph 16 of Amended Answer.**

Now on this day came on for hearing plaintiff's motion to strike portion of paragraph 16, of the amended answer of John A. Jesson, Raymond Brumbaugh, E. R. Peoples, James W. Hill, John A. Clark and George Preston filed herein; O. L. Rider appearing for and in behalf of plaintiff, and John A. Clark appearing for and in behalf of defendants; after argument thereon by the respective at-

torneys, and the Court being duly and fully advised in the premises,

IT IS ORDERED that said motion be, and the same is hereby allowed.

F. E. FULLER,
District Judge. [125]

[Title of Court and Cause.]

Reply to Amended Answer of Defendants John A. Jesson, Raymond Brumbaugh, E. R. Peoples, James W. Hill, John A. Clark, and George Preston.

FIRST.

Comes now the plaintiff and for reply to the amended answer of the above-named defendants says that he denies each and every allegation and statement of new matter therein contained except those hereinafter specifically admitted.

SECOND.

For reply to the first and separate answer of said defendants he denies each and every allegation therein contained, except those hereinafter expressly admitted or otherwise denied.

He admits that E. T. Barnette was a member of the Board of Directors and president of the Fairbanks Banking Company, a corporation, as stated, and that he was thoroughly conversant with the affairs of said bank.

He admits that the capital stock of the Gold Bar Lumber Company was carried on the books of said corporation at \$341,949.00 and that the same was

one of the principal assets of said bank; that the same was originally purchased by the Fairbanks Banking Company, a copartnership consisting of E. T. Barnette, James W. Hill and R. C. Wood. As to whether or not the said Barnette was at all times familiar with the affairs of the said Gold Bar Lumber Company, a corporation, and with the value of its properties, and the extent and variety of its assets, the amount of its [126] liabilities, and knew the value of its stock, this plaintiff has neither knowledge nor information sufficient to form a belief.

He admits that the said Barnette was actively engaged in mining in the Fairbanks precinct during the time he was a director and president of the Fairbanks Banking Company, a corporation, and was familiar with the financial standing and moral responsibility of the majority of the men who were carrying on mining operations or engaged in business in said Fairbanks district, but as to whether or not he passed on and gave his judgment on most of the loans that were made during the time he was president of said bank, while in the Territory of Alaska, this plaintiff has neither knowledge nor information sufficient to form a belief.

Admits that with the exception of two other directors, the said Barnette is the only director who was director from the time of the organization of said bank until its close, and that he was recognized by the public at large as a man of wealth, and that a great deal of the business of said bank was acquired by reason of personal friendship between depositors and other persons doing business with said

bank and the said Barnette. As to whether or not the said Barnette alone of all the directors had personally visited the properties of the said Gold Bar Lumber Company and had first hand knowledge of their value and condition, this plaintiff has neither knowledge nor information sufficient to form a belief.

Admits that none of the other directors of said bank received a salary as directors, and alleges that said Barnette received no salary as director. Admits that said other directors were engaged in other lines of business, and alleges that the said Barnette was also. As to whether or not the said Barnette was the only one in a position to devote any considerable portion of his time to the affairs of said bank, this plaintiff has neither knowledge nor information sufficient to form a belief.

He admits that said Barnette had an office in said bank, and that the officers and employees of said bank were subject to receive orders from him within the limits prescribed by the [127] by-laws of said bank, and that the books, records, loans, notes and discounts of said bank were readily accessible to him, and that the affairs of said bank were thoroughly understood by him. He alleges that said books, records, loans, notes and discounts were also readily accessible to any other officers or directors of said bank.

He admits that the said Barnette was not in the Territory of Alaska at the time of the suspension of said bank, and that in the month of February, 1911, and after he had been advised that said bank had suspended and receivers appointed therefor, he

returned to Fairbanks. As to any negotiations between the said Barnette and the then receivers of said bank, or the purpose thereof, or as to any proposition made by said Barnette to said receivers, or as to any promise or agreements made by the said Barnette to said receivers, other than as the same are evidenced by the deeds of trust referred to in said first separate and affirmative answer, this plaintiff has neither knowledge nor information sufficient to form a belief.

He admits that the execution by said Barnette and the delivery to said former receivers of said bank of the deed of trust to property situate in the Republic of Mexico and set out in said first separate and affirmative answer of said defendants for the purposes specified in said deed of trust, and admits that the plaintiff has a copy of the same.

He admits the execution by said Barnette and wife, and the delivery to said receivers of a certain deed of trust to the real property therein described situate in Fairbanks Precinct, Alaska, upon the terms and conditions and for the uses and purposes set forth in said deed of trust.

He admits that the said Isabelle Barnette was never a director of said bank and in no way liable for any of its said indebtedness. As to the reason why she joined her husband in said deed of trust and in said petition to the Court, this plaintiff has neither knowledge nor information sufficient to form a belief. [128]

This plaintiff alleges that said deeds of trust are in writing and express for themselves the terms and

conditions thereof, the uses and purposes for which they were executed and delivered, and the admissions, agreements and assumed obligations of the said Barnette and his said wife, and this plaintiff has no knowledge nor information concerning such matters beyond the express terms of said deeds.

He admits that the Judge of the District Court for the Fourth Judicial Division of Alaska at that time, referred the application of the said Barnette and wife for the acceptance of said deeds of trust to the then receivers for their consideration.

He admits that thereafter said Judge in writing authorized said receivers to receive said deeds and enter into possession of the properties situate in Fairbanks precinct.

As to whether or not the attorneys for the then receivers had prepared a complaint against said Barnette and the other directors of said bank at the time the proposition of the said Barnette and wife was made, charging the alleged wrongful acts contained in plaintiff's complaint on the grounds and for the purposes set forth in said answer, and were about to file the same with the Court and serve said defendants, this plaintiff has neither knowledge nor information sufficient to form a belief.

He admits that the said former receivers entered into the possession of the real property in the Fairbanks precinct and proceeded to collect the rentals and royalties therefrom, and that there has been received by said receivers and their successor in office, this plaintiff, from the rentals and royalties on said property a large sum of money, the gross amount is

upwards of \$30,000.00 as stated, which he is holding subject to the terms and conditions of said trust deed.

This plaintiff further admits that in the deed of the said Barnette and wife to the property in said Fairbanks district, it is provided that any of said property could be sold at any time on the agreement of the said Barnette and wife and said receiver, [129] and he admits that certain property covered by said transfer has been sold by the receiver and said Barnette and wife under and by virtue of the terms of said agreement and that the money realized from said sale has been delivered to said receiver. Plaintiff alleges that said money so received amounts to \$2500.00 which he is holding subject to the terms and conditions of said trust deed.

He admits that the property conveyed by the said Barnette and wife in said Fairbanks precinct consists of improved and income-producing properties, the last of which is situate in the business section of Fairbanks, Alaska, and he alleges that the rentals therefrom aggregate approximately \$450.00 per month at this time.

He admits that the said trust deed has been partially executed to the extent above set forth, but as to what the attitude of the said Barnette will be in the matter of the indebtedness of said corporation in the event sufficient money has not been realized on the assets of said corporation before November 18th, 1914, to pay all of the indebtedness of said corporation, or what his attitude will be in the matter of a sale of said property, or so much thereof as may be necessary in satisfaction of all outstanding indebted-

ness and liabilities of said bank, together with interest thereon as alleged, this plaintiff has neither knowledge nor information sufficient to form a belief.

He admits that at the time of the execution and delivery of said trust deeds there was other indebtedness of said bank than the indebtedness due to depositors and holders of unpaid drafts, among which was the claim of Dexter Horton National Bank for a sum in excess of \$120,000.00 as alleged, to secure which, the said Dexter Horton National Bank claimed a lien upon the stock of the Gold Bar Lumber Company belonging to said bank and which [130] was then in the possession of the said Dexter Horton National Bank; but as to whether or not said stock was recognized by the then receivers and the attorneys for said receivers and the Court, as being of a value greater than sufficient to pay said claim of said Dexter Horton National Bank, and that if said stock was sold under foreclosure of the pledge claimed thereon it would pay the indebtedness of the said Dexter Horton National Bank, and for that reason no reference to indebtedness was made in said trust deeds other than the indebtedness due to depositors and holders of unpaid drafts, this plaintiff has neither knowledge nor information sufficient to form a belief.

He alleges that since said time the said Dexter Horton National Bank has instituted a suit for the foreclosure of the pledge claimed by it on said stock and has recovered a judgment establishing said lien and ordering sale of said stock in satisfaction of the same; that said sale under said judgment has been had and

said stock bid in thereat by said Dexter Horton National Bank for \$100,000.00, and unless the same is reversed or set aside on appeal said judgment and sale will become final.

As to whether or not the former receivers, after the delivery of said trust deeds, abandoned all idea of instituting a suit against said Barnette or any other director of said bank, this plaintiff has neither knowledge nor information sufficient to form a belief. He admits that no suit was instituted by them, as stated, and that no suit was instituted against said directors until after the appointment of the present receiver, this plaintiff. He alleges that in the institution and prosecution of this suit he is acting under order of Court; he admits that the said Barnette was not joined as a party defendant in this action, and he alleges that the reason therefor is that the acceptance of said trust deeds operated as an agreement not to sue said Barnette prior to November 18th, 1914.

[131]

He admits that since the institution of this suit the said Barnette has been within the jurisdiction of this Court as stated and could have been served with process, but he alleges that he was not served in this suit for the reason that he was not a party thereto.

THIRD.

For reply to the second separate affirmative answer of the above-named defendants, plaintiff says that he denies each and every statement and allegation therein contained, except as hereinafter admitted:

He admits that during the whole time said defendants were directors of said bank, the said E. T. Bar-

nette was likewise a director and was president of said bank:

He admits that subsequent to the closing of said bank and prior to the institution of this action the said E. T. Barnette and Isabelle Barnette his wife, executed and delivered to the receivers of said bank a deed to certain income-producing properties situate in the town of Fairbanks, Alaska, and that said receivers have received certain monies from the sale of certain of said properties in the town of Fairbanks, Alaska, which amount this plaintiff alleges to be \$2,500.00;

Plaintiff further admits that said receivers since said date have received the rent from said properties but he alleges that the gross income thereof up to April 1st, 1914, does not exceed \$20,606, out of which he has paid up to April 1st, 1914, expense incident to the care of said properties, approximately, \$1457.32.

This plaintiff further alleges that said deed of trust is in writing and expresses for itself the terms and conditions thereof, the uses and purposes for which it was executed and delivered and the admissions, agreement and assumed obligations of the said E. T. Barnette and his said wife, and this plaintiff has no knowledge nor information concerning such matters beyond the expressed terms of said deed.

O. L. RIDER,

Attorney for Plaintiff. [132]

United States of America,
Territory of Alaska,—ss.

F. G. Noyes, being first duly sworn, deposes and says: I am the plaintiff named in the foregoing

reply; I have read said reply, know the contents thereof, and believe the same to be true.

F. G. NOYES.

Subscribed and sworn to *before this* 22d day of April, 1914.

[Seal]

L. D. BENNETT,

Notary Public in and for the Territory of Alaska.

My commission expires June 24, 1916.

Service of copy accepted this 22d day of April, 1914.

McGOWAN & CLARK,

Attorneys for Defendants.

[Indorsed]: No. 1756. In the District Court, Territory of Alaska, Fourth Division. F. G. Noyes, Receiver of the Washington-Alaska Bank, a Corporation, Plaintiff, vs. J. A. Jesson et al., Defendants. Reply to Amended Answer of Defendants John A. Jesson, Raymond Brumbaugh, E. R. Peoples, James W. Hill, John A. Clark and George Preston. Filed in the District Court, Territory of Alaska, 4th Div., Apr. 22, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [133]

[Title of Court and Cause.]

Findings of Fact and Conclusions of Law.

BE IT REMEMBERED that on the 22d day of April, A. D. 1914, the above-entitled cause came on for trial before the Court without a jury upon the issues as joined between the plaintiff and the defendants, the Honorable F. E. Fuller, Judge of said court, presiding; the plaintiff appearing in person and by his attorney O. L. Rider; the defendants ap-

pearing in person and by their attorneys John L. McGinn, John A. Clark and A. R. Heilig, and thereupon the respective parties plaintiff and defendants, from day to day, introduced their testimony in support of said issues until the 6th day of May, 1914, when all parties rested and the introduction of said testimony was closed.

And thereupon the Court, after hearing the allegations, testimony and proofs of the respective parties, and the arguments of counsel, and being fully advised in the premises, does hereby make and file, as constituting its decision in said cause, the following Findings of Fact and Conclusions of Law.

I.

That the Washington-Alaska Bank, of which the plaintiff is receiver, was incorporated under the laws of the State of Nevada on the 21 day of January, 1908, with an authorized capital stock of \$300,000.00, divided into 3,000 shares of the par value of \$100.00 each; that said bank was incorporated under the name of the Fairbanks Banking Company; and that [134] subsequently, by amendment to its Articles of Incorporation, said name was changed to Washington-Alaska Bank.

II.

That said bank commenced business in the town of Fairbanks, Alaska, on the 16 day of March, 1908, with a subscribed capital of \$206,000.00, part of which was paid for in cash, part in property, and the balance by the promissory notes of the subscribers.

III.

That prior to the 21 day of January, 1908, sub-

scriptions for said capital stock was circulated, and the following persons, among others, subscribed for shares thereof, to wit, E. T. Barnette, 440 shares, R. C. Wood, 220 shares, James W. Hill, 220 shares; the name of R. C. Wood being subscribed thereto by said E. T. Barnette.

IV.

That prior to the incorporation of said bank, the said Barnette, Hill and Wood, as copartners were conducting a banking business in said town of Fairbanks under the firm name and style of Fairbanks Banking Company, which said company in December, 1907, owing to financial difficulties, was unable to meet its obligations and was compelled to suspend business and close its doors, and was, at the time of the organization of said corporation, in the hands of trustees.

V.

That said corporation was organized, among other things, for the purpose of taking over the business and affairs of said partnership and assuming its outstanding obligations.

VI.

That the capital of said partnership was \$200,000.00 which belonged to said Barnette, and the agreement existing between said partners was that the profits of said partnership were to be divided, one-half to said Barnette, and one-fourth each to said Hill and Wood.

VII.

That thereafter, and in the fore part of January, 1908, a large number of business, professional and

mining men of the [135] Fairbanks recording district, Alaska, met in the town of Fairbanks, Alaska, for the purpose of organizing a corporation to purchase and take over and absorb the business of the Fairbanks Banking Company, a partnership, and at said meeting negotiations were begun by said proposed incorporators, with said copartnership for the purchase of the same. That at said meeting a committee was appointed to go into the details of the reorganization of the Fairbanks Banking Company, and to report a basis upon which the business should be taken over, two of the members of this committee having been members of the committee of depositors which had in December examined the assets.

VIII.

That said committee met on the 5th day of January, 1908, and, after investigating the affairs of the bank, made the following report to be presented for the consideration of the proposed new corporation:

(a) That the issued stock for the proposed new corporation be as of date February 15, 1908; that notes be taken for all deferred payments; that the same bear interest at the rate of one per cent per month from February 15, 1908, until paid; that twenty-five per centum of the unpaid for stock be due and payable on or before June 1st, 1908, and that the balance be due and payable on or before July 1st, 1908.

(b) That Captain E. T. Barnette and James W. Hill, with such associates as they may require, prepare a subscription list.

(c) That the amounts subscribed by any person

be left to that person, and in case of over-subscription should be reduced proportionately.

(d) That the notes, properties, and securities of the Fairbanks Banking Company, the old institution, examined by its present acting board of trustees and on which a valuation of \$288,000.00 in excess of its liabilities was placed, be accepted.

(e) That all notes, properties and securities which said board of trustees placed in the No. 3, or doubtful class remain [136] the property of the old institution.

(f) That all interest on existing loans as of December 19, 1907, be computed to February 15, 1908, and that the amount of such accrued interest be placed to the credit of the old institution on the books of the new corporation, and that the same be payable on or before December 31, 1908.

(g) That should James W. Hill and R. C. Wood not take the full forty-four thousand dollars in stock in the new corporation, the balance of the amount not so taken to be paid to them not later than July 1st, 1908.

(h) That the proposition of Captain E. T. Barnette to leave on deposit with the new corporation the sum of two hundred thousand dollars, without interest for one year be accepted, and that it be the understanding that such deposit will secure said new corporation against any adverse decision of the Court in the Caustens vs. Barnette suit in so far as such decision may decrease the value of the Gold Bar Lumber Company property as accepted by the present board of trustees.

(i) That the officers of the new corporation be a president, vice-president, second vice-president, cashier, assistant cashier, treasurer, and secretary.

(j) That the number of the board of directors be twelve, four to be elected for six months, four for twelve months, and four for eighteen months or until their respective successors are duly elected and qualified.

(k) That dividends be declared semi-annually on June 30 and December 31.

IX.

That said report was, on January 6th, 1908, submitted to said proposed incorporators, and at said meeting the said report was read, and passed on section by section as read, and on motion duly made and carried was adopted and ordered kept as a part of the records of said meeting. [137]

X.

That at said meeting a subscription list, a copy of which is set forth in paragraph 3 of the amended complaint in this cause, was presented and signed by said proposed incorporators, setting forth the amount for which each respectively subscribed.

XI.

That at said meeting it was also agreed on behalf of the Fairbanks Banking Company, a copartnership, that said partnership would turn over to said corporation the property of said Fairbanks Banking Company, a partnership, on the terms specified in said report, and said proposed incorporators in behalf of said proposed corporation, in consideration

thereof, agreed to assume the liabilities of said partnership.

XII.

That said Fairbanks Banking Company, a corporation, became such on the 21st day of January, 1908. That on the 8th day of February, 1908, a meeting of the subscribers of the capital stock of the Fairbanks Banking Company was held for the purpose, among others, of obtaining notes of the subscribers for the stock subscribed by them, and, at said meeting, said stock notes were subscribed by said subscribers of stock and delivered to said corporation.

That at the time of said meeting the Articles of Incorporation of said Fairbanks Banking Company had not been received from the State of Nevada, and for the purpose of expediency it was deemed advisable to elect a board of directors, and twelve directors were elected at said meeting, and it was agreed that said board of directors should act as such until the arrival of the Articles of Incorporation, when a formal meeting would be held and proper by-laws be adopted.

XIII.

That said Articles of Incorporation did not arrive in Fairbanks until sometime in the month of March, 1908, and immediately thereafter a meeting of the stockholders of the [138] Fairbanks Banking Company, a corporation, was called, and at said meeting said stockholders, among other things, adopted by-laws and elected a board of directors, and also passed a resolution to the effect that the matter of taking

over the property of the Fairbanks Banking Company, a partnership, be left to the Board of Directors.

That on the 12th day of March, 1908, at said meeting of the subscribers to said capital stock, said subscriptions were accepted by them and the above-named Barnette, Hill and Wood, together with the other subscribers, were declared to be stockholders of the said corporation. The defendant Wood was not present at said meeting, but he was notified of the result of the same by the defendant Hill.

XIV.

Subsequently, at a meeting of the stockholders of said corporation it was resolved that the matter of taking over the business and affairs of said partnership be left to the Board of Directors. Thereafter, on March 12, 1908, at a meeting of the Board of Directors, said matter was considered by them and the resolutions of the proposed stockholders, set out in Finding VIII hereof, were by said directors adopted and approved, except that the resolution providing for the payment of accrued interest up to February 15, 1908, was by them amended so as to read "March 15, 1908." At the same meeting it was ordered by said Board of Directors that stock issue to said Barnette, Hill and Wood in exchange for the property received from them by said corporation as follows: Barnette 440 shares; Hill 220 shares; Wood 220 shares.

XV.

That on the 16th day of March, 1908, a written agreement was entered into between said corporation and said partners, and on the same day the same was

signed by the said Barnette and Hill, and also on behalf of said bank by its president and secretary, wherein the valuation of the resources of said partnership was fixed at \$790,940.31 and its liabilities at \$538,940.31, leaving an excess of [139] \$252,000.00 belonging to the said Barnette, Hill and Wood, in which said agreement the said Barnette, Hill and Wood agreed to accept stock of the corporation at its par value for the amount of assets in excess of said liabilities, except that \$200,000 thereof should be placed to the credit of the said Barnette as a special deposit with said corporation upon the terms therein stated. By the terms of said agreement the amount of stock to be issued to Barnette, Hill and Wood, was fixed at \$52,000.00 instead of \$88,000.00 as contemplated by said resolution and subscription, thus entitling Barnette to 260 shares and Wood and Hill each to 130 shares, a copy of said agreement is annexed to plaintiff's complaint and marked "Exhibit One."

XVI.

That at the time said agreement was entered into, the said Barnette was president of the said corporation and also a member of the Board of Directors, the said Hill was a member of its executive committee and also its vice-president, and the said Wood was its cashier, and the said defendant John A. Jesson was a member of its Board of Directors. That the above-named Wood, Hill and Jesson are all of the officers of the said bank at the time said agreement was entered into upon whom services has been made in this case, and who are now before the court as defendants.

XVII.

That the matter of preparing the papers for the transfer of said property belonging to said partnership to said corporation was, by the Board of Directors, left to the executive committee, and the said executive committee examined the affairs of said partnership, and, under their direction, said written agreement was prepared and afterward submitted to the Board of Directors for approval, and by them approved.

XVIII.

That according to the by-laws of said corporation, the said executive committee had the same powers as the Board of Directors, subject to approval of their acts by said Board of Directors. [140]

XIX.

That at the time said written agreement was signed and executed, and during all of the negotiations leading up to the making of the same, the defendant Wood was in Seattle, Washington, but he was advised fully concerning the same by the defendant Hill by letter and by telegram.

XX.

That prior to the return of said Wood to Fairbanks, to wit, on the 29th day of February, 1908, he offered to sell his stock in said corporation and to take in payment therefor part cash and a note for the balance, to be secured by said stock as collateral security.

XXI.

That the defendant Wood returned to Fairbanks sometime in the month of April, 1908, and, upon his

return, he signed said written agreement so entered into as aforesaid, knowing that the same contained said clause requiring him to take stock for his share of the assets of said partnership so transferred to said corporation in excess of the liabilities thereof as aforesaid, and also knowing that the same did not provide for the payment of said accrued interest.

XXII.

That of the loans and discounts transferred by said partnership to said corporation a large amount were then past due, of which the part due paper the sum of \$69,908.94 now remains in the hands of the receiver unpaid and uncollectible, which said loans and discounts were accepted by the directors of said corporation at their face value, and the same were included in those on which the accrued interest referred to in said resolution was afterward computed.

XXIII.

That of said notes so past due as aforesaid, there were two executed by the Tanana Electric Company in the sum of \$27,997.38 [141] which depended for their value upon the existence of an alleged guaranty of the Scandinavian-American Bank to make advancements sufficient to cover the same; that said alleged guaranty never had any existence in fact, and the claim therefor had been repudiated by said Scandinavian-American Bank prior to the time said note was accepted by said Board of Directors, and said repudiation was known to the members of said board. That said notes are still unpaid, and the same was at all times carried on the books of the said Washington-Alaska Bank, formerly Fairbanks Banking Com-

pany, as an asset in the sum of \$27,997.38.

XXIV.

That said Board of Directors and the officers of said bank accepted said notes of the Tanana Electric Company and paid therefor the sum of \$27,997.38, with knowledge on the part of each of them that the same depended for their value upon said alleged guaranty alone.

XXV.

That among the other assets of said partnership so accepted by said officers and directors was four-fifths of the capital stock of the Gold Bar Lumber Company, a corporation existing in the State of Washington, which said stock was accepted and paid for at the valuation of \$341.949.00, and said stock was at all times during the existence of said corporation carried as an asset in said sum.

XXVI.

That at the first meeting of the Board of Directors, held on the 12th day of March, 1908, the defendant Wood was elected Cashier of said bank, at which time he was then in the said City of Seattle, Washington, as aforesaid. Immediate notice was given to him of said election.

XXVII.

That the said Wood accepted said office of cashier while in the said City of Seattle, and, on the 16th day of March, 1908, entered upon the discharge of his duties as such cashier, and, upon his return to said Fairbanks in April, 1908, as aforesaid, entered [142] actively upon such duties and continued to so act until June 29, 1908, when he tendered his resig-

nation as such cashier, and the same was accepted by the Board of Directors to be effective at the close of business on June 30, 1908, and one B. R. Dusenbury, who was then assistant cashier, was elected to succeed Wood as cashier.

XXVIII.

That at the time said Wood tendered his resignation as cashier as aforesaid, he demanded that there be paid to him the amount of his interest in said partnership assets, to wit, \$13,000.

XXIX.

That a certificate for 130 shares of the capital stock of said corporation had been written up in the name of the defendant Wood, of the par value of \$13,000, but the same was never detached from the stock book. That said 130 shares were carried on the books of said bank as outstanding stock from March 16, 1908, to June 30, 1908.

XXX.

That on the 30 day of June, 1908, with the knowledge, consent, and approval of the officers and directors of said bank a certificate of deposit was issued to and accepted by the said Wood in the sum of \$13,000, in lieu of said stock, which said certificate was signed by the said B. R. Dusenbury as assistant cashier prior to when the said resignation of the said Wood, as cashier became effective, and said shares of capital stock were on the same day charged to treasury stock on the books of said bank.

XXXI.

That subsequently the said Wood drew out in cash from the funds of said bank the amount of the said

certificate of deposit, to wit, \$13,000.

XXXII.

That at the time the said certificate of deposit was issued to said Wood there was in effect a resolution of the said board of directors requiring monthly statements, showing the condition of said bank, to be presented to said Board of Directors and that [143] in accordance with said resolution, there was, during the existence of said bank, presented to said Board of Directors at each monthly meeting thereafter a statement showing the condition of said bank, and said statements were examined in detail by said board and by them ordered filed.

XXXIII.

That there was submitted to said Board of Directors at its meeting on July 13, 1908, a written report in detail showing the condition of the affairs of said bank, which said report was examined in detail and was ordered filed, and, under the question of this report, the question of refunding to those desirous of giving up their stock in the Fairbanks Banking Company was discussed, and it was the sense of the meeting that any stockholder desirous of giving up the stock, be paid for the same, and the stock returned to the treasury of said bank.

XXXIV.

That at the time the said certificate of deposit was issued to said Wood, and his shares of stock so charged to treasury stock as aforesaid, the following of the defendants now before the Court in this action were among its officers, to wit, James W. Hill, a member of the executive committee and its vice-

president, John A. Jesson, a member of the Board of Directors, R. C. Wood, cashier and a member of its executive committee; and, at said meeting of July 13, 1908, at the time said report was submitted and the sense of said meeting was expressed as aforesaid, the said John A. Jesson was present and participated therein as a member of the Board of Directors, and the said James W. Hill was also present as its vice-president and a member of the executive committee.

XXXV.

That of the notes accepted from said partnership as aforesaid and paid for by said corporation, there were charged on December 31, 1907, by said partnership on the books of said partnership to [144] an account known as "doubtful account" the sum of \$22,979.99 and said doubtful account, so including said notes in said amount, was then depreciated on the said books to the amount of thirty-three and one-third per cent thereof, which said notes were accepted by said corporation and paid for by them in the amount aforesaid, to wit, \$22,979.99, all of which said notes were then past due, and of which there still remains unpaid and uncollectible the sum of \$12,860.-61. That of said notes so charged to said doubtful account as aforesaid, there was on December 31, 1909, charge by said corporation to the account of profit and loss on the books of said corporation the sum of \$12,192.80.

XXXVI.

That on March 23, 1908, pursuant to said resolution of the said board of directors adopted on March 12, 1908, the accrued interest on said loans so trans-

ferred to said corporation was computed to March 15, 1908, in the sum of \$39,642.81, and one-half thereof was placed to the credit of said Barnette, and one-fourth thereof each to the credit of said Hill and Wood on the books of said corporation, and subsequently the same was paid to said Barnette, Hill and Wood in cash.

XXXVII.

That of said interest so paid to said Barnette, Hill and Wood as aforesaid, approximately \$7500.00 thereof was never collected by said bank.

XXXVIII.

That at the time said resolution allowing said interest was adopted, and at the time the amount thereof as aforesaid was placed to the credit of said Barnette, Hill and Wood as aforesaid, on the books of the said bank, the following defendants now before the Court in this action were officers of said bank, to wit, [145] John A. Jesson, member of the board of directors, James W. Hill member of the executive committee and vice-president, and R. C. Wood, cashier.

XXXIX.

That at the time said corporation commenced business on March 16, 1908, it had a total subscribed and outstanding capital stock in the sum of \$206,000.00, only a small portion of which was paid for in cash, and at no time did the same exceed said amount; and that of its funds \$341,949.00 was at all times invested in stock of the Gold Bar Lumber Company, being \$135,949, in excess of its subscribed and outstanding stock.

XL.

That at the time said investment was so made as aforesaid, said Lumber Company was closed down, and immediately prior to closing down, it has been operated at a loss, that in so far as said Lumber Company was able to operate since the purchase of said stock by said corporation, all of its earnings and a part of its surplus have been expended in the purchase and repair of equipment for said mill, and in the operation of said mill its standing timber was being consumed and its best asset exhausted. That no dividends have ever been paid on the capital stock of said lumber company during the time the same was owned by said bank.

XLI.

That the Articles of Incorporation of said corporation authorized and empowered said corporation among other things,

To buy and sell gold and silver bullion, foreign coin, stocks, bonds, and all other property, real and personal, and to do any business and exercise any powers incident to the banking business, or necessary or proper to the furtherance and attainment of the purposes of said bank.

XLII.

That subdivisions 5 and 6 of Articles XII of the by-laws of said corporation, adopted at the stockholders meeting held March 12, 1908, provided that all issued and outstanding stock of the company that may be donated to, or purchased by the company, or [146] which shall revert by reason of failure to pay for the same, shall be treasury stock, and shall be held

subject to the disposal of the action of the Board of Directors. Said stock shall neither vote nor participate in dividends while held by the company. The Board of Directors shall be given the first option to purchase for the corporation the stock of any stockholder, and shall be entitled to purchase the same provided said Board of Directors shall offer to pay to said stockholder the same amount as he might obtain from any other person.

XLIII.

That on the 14th day of September, 1908, the executive committee of the said Fairbanks Banking Company, consisting of Barnette, president, Hill, vice-president, Dusenbury, cashier, and directors Jonas, John Jesson and Ryan, passed a resolution to the effect that said corporation would not take over any more stock of the stockholders, which said resolution of the executive committee was approved and ratified by the board of directors on October 14, 1908, the directors present at said meeting being, Hill, Peoples, Yarnell, Robinson, Ryan, Jonas, and Jesson, and also the said Dusenbury was present.

XLIV.

That after said bank took said stock of said Wood into its treasury, frequent and continuous surrenders of its stock were made by its stockholders, amounting in all to thirty-eight different and distinct transactions, aggregating a total of \$43,000, exclusive of said Wood's stock. That the stock so taken back by the corporation was charged to the treasury stock account, and of the same only ten shares of the par value of \$1000 were ever re-issued. That said stock

surrenders continued down to and including October 25, 1910, when the last surrender was made, being the McGinn stock of the par value of \$10,000, for which the sum of \$6000 in case was paid by the bank to said McGinn. [147]

XLV.

That upon the 18th day of November, 1908, Strandberg Brothers were the owners of 100 shares of the outstanding capital stock of said Fairbanks Banking Company, Emma Strandberg was the owner of 10 shares, and B. E. Johnson was the owner of 10 shares.

That said stock was taken in part payment of a loan that the bank had theretofore made to said Strandberg Brothers and said Johnson, who were mining copartners, and the bank also received at said time the further sum of \$4,000 in cash, which fully paid said loan. That said transaction amounted to the taking of stock for a pre-existing debt, rather than the purchase of stock by the Board of Directors. That said directors believed at said time said loan was precarious, and said directors, in taking said stock in partial satisfaction of said loan, did so in good faith and believing it to be for the best interests of the corporation.

XLVI.

That on the 3d day of February, 1909, at a meeting of the executive committee of said bank, it was again resolved that the officers of said bank be directed to say that "the corporation did not desire to buy in its stock at present," which said resolution of the said executive committee was thereafter and on to wit, the 13th day of February, 1909, approved and reti-

fied by the said board of directors.

XLVII.

That on the 15th day of March, 1909, H. B. Parkin, who was the owner of 10 shares of the outstanding capital stock of said bank, and Oscar Tackstrom, who was the owner of 5 shares of the said outstanding capital stock, requested the executive committee of said bank to buy their stock.

That said executive committee thereupon again announced its policy, by resolving "It was the sense of the meeting that the bank observe the rule established at a previous meeting of the board wherein it was declared not to buy in any more stock," which [148] said resolution was approved and ratified by the board of directors at said meeting held April 12, 1909, at which meeting of the directors the following officers and directors were present; Barnette, Claypool, Hill, Jesson, Robinson, Yarnell, Brumbaugh, Peoples and Dusenbury.

XLVIII.

That John L. McGinn was a stockholder of the Washington-Alaska Bank, formerly the Fairbanks Banking Company, and was the owner of 100 shares of the outstanding capital stock of said Washington-Alaska Bank, of the par value of \$10,000.

XLIX.

That a short time prior to the 13th day of October, 1910, John L. McGinn, as a stockholder of the Washington-Alaska Bank, formerly the Fairbanks Banking Company, demanded the right to inspect its books and papers, and threatened that, unless this right was granted him immediately, to make application for an

order permitting him to do so and for the appointment of a receiver of the said Washington-Alaska Bank. That the directors of the Washington-Alaska Bank, fearing that information obtained by such an investigation would be used by said McGinn in promoting the interests of the First National Bank in its business, and that if such information was refused and any litigation was started it would impair public confidence in the Washington-Alaska Bank and perhaps start a run of its customers and depositors on said bank, acting under this belief, authorized the cashier to loan a purchaser sufficient funds to pay for the stock of said McGinn; one of the directors stating at said time that he had a purchaser who would be willing to purchase said stock for the sum of \$6000, but it would be necessary for him to borrow money to complete said purchase; that, as the matter was urgent and the purchaser was not immediately available, the cashier purchased the stock in his own name and gave his note to the bank for the amount [149] thereof and paid to said John L. McGinn the sum of \$6,000.00 for his 100 shares of capital stock. That thereafter, and on or about the 25th day of October, 1910, said cashier, without the knowledge of any of the directors, cancelled his note and charged the amount thereof to the bank, and surrendered the stock to the bank, and the stock was thereafter held, with other treasury stock of the company.

L.

That upon said 13th day of October, 1910, the director George Preston, by reason of sickness of his family, was quarantined and unable to attend the

meeting of the Board of Directors held on said day, and was not present thereat, and knew nothing of the action taken at the meeting of said board.

LI.

That when stock was so taken back by the corporation, the amount paid therefor was either paid in cash, or notes held by the bank were cancelled and surrendered to the stockholders.

That said bank had no surplus or undivided profits against which the same could be charged.

LII.

That the taking back of said stock and the payment therefor as aforesaid was illegal, wrongful, and in violation of the laws of the State of Nevada under which said corporation was organized.

LIII.

That after the surrender of the stock of the said Wood, to wit, from July 13, 1908 to and including September 12, 1908, stock was so taken up in the sum of \$13,400.00, during which time the defendant John A. Jesson was a member of the board of directors, and the defendants James W. Hill a member of its said executive committee.

That from September 13, 1908 to and including October 13, 1908, [150] stock was so taken up in the sum of \$1500.00 during which time the defendants John A. Jesson and James W. Hill were members of the Board of Directors;

That from October 14, 1908 to and including March 13, 1909, stock was so taken up in the sum of \$13,100.00, during which time the defendants Jesson, Hill and Peoples were members of the Board of Directors;

That from the 14 of March, 1909, to and including September 12, 1909, stock was so taken up in the sum of \$1000.00, during which time the defendants John A. Jesson, Hill and Brumbaugh were members of the Board of Directors;

That from September 13, 1909, to and including October 12, 1909, stock was so taken up in the sum of \$3000.00, during which time the defendants John A. Jesson, Hill and Brumbaugh and McGinn were members of the Board of Directors.

That from October 13, 1909, to and including January 18, 1910, stock was so taken up in the sum of \$1000.00, during which time the defendants John A. Jesson, Hill, McGinn and Brumbaugh and Wood were members of the Board of Directors;

That from January 19, 1910, to and including October 25, 1910, stock was so taken up in the sum of \$10,000, for which the said sum of \$6,000.00 was paid in cash, and at the time said stock was so taken up the defendants John A. Jesson, Brumbaugh, Clark, Healey and Preston were members of its Board of Directors.

LIV.

That said stock surrenders so made as aforesaid were acquiesced in by said directors, and in some instances were made under their directions and with their express approval.

LV.

That in the month of May, 1909, said Fairbanks Banking Company and the Washington-Alaska Bank of Washington, then doing business at Fairbanks, each purchased one-half of the capital stock of

[151] the First National Bank of Fairbanks, Alaska, for which each paid the sum of \$62,500.00 and continued to own and hold said stock until the month of May, 1910.

That on or about the 4th of May, 1910, said Fairbanks Banking Company sold the entire capital stock of the said First National Bank to the defendants Wood and McGinn for the sum of \$125,000.00 and received said amount in payment therefor, delivering to them the said capital stock of said First National Bank.

That at the time said banks purchased said stock of the First National Bank, they gave to said Wood an option to purchase the same on or before June 1, 1910 for the sum of \$125,000.00, and said sale to said Wood and McGinn was made in pursuance to said option.

That neither the said Fairbanks Banking Company, nor the said Washington-Alaska Bank of Washington, received any dividend on said stock of the said First National Bank during the time the same was held and owned by them, nor did they, or either of them, receive any interest from the said Wood and McGinn, or from anyone in their behalf, for the money invested in said stock during the time the same was so invested.

LVI.

That on September 14, 1909, the said Fairbanks Banking Company purchased the entire capital stock of the said Washington-Alaska Bank of Washington, paying therefor the sum of \$250,000.00,

which said capital stock at said time was of the par value of \$150,000.

LVII.

That at the time the said capital stock of said Washington-Alaska Bank of Washington was so purchased, the defendants J. A. Jesson, James W. Hill and John L. McGinn were members of the Board of Directors of the Fairbanks Banking Company, and said purchase of said capital stock was ratified and confirmed by them as members of said board on the said 14 day of September, 1909. [152]

That at the time the aforesaid resolution was adopted by the said board of directors to take over the business and affairs of said partnership; and at the time said written agreement between said corporation and said partners was entered into and confirmed and approved; and at the time said valuation was placed on said capital stock of the said Gold Bar Lumber Company and said stock accepted at such valuation; and at the time said past due notes held by said partners were accepted and paid for by said corporation, including said notes of the said Tanana Electric Company and said notes which had been charged to the doubtful account of said partnership as aforesaid; and at the time said accrued interest on said notes so purchased of said partnership was computed and allowed to said partners and placed to their credit as aforesaid on the books of said corporation, the following defendants now before the Court in this action were officers and directors of said corporation and acquiesced in said transactions and gave their consent thereto with full

knowledge on the part of each of them of the existence of the facts heretofore found respecting said transactions, to wit, James W. Hill, vice-president and member of its executive committee, John A. Jesson, member of its board of directors, R. C. Wood, its cashier. That the said Hill and Wood were also members of the partnership with which said corporation contracted respecting said matters and were each personally interested therein adversely to said corporation.

LIX.

That at the time of the said sale of the said capital stock of the said First National Bank to the said Wood and McGinn, the following defendants now before this Court were officers and directors of the said Fairbanks Banking Company, and each consented to said sale on the terms thereof heretofore stated, to wit, J. A. Jesson, R. C. Wood, John L. McGinn and Ray Brumbaugh.

LX.

That on the 12 day of April, 1910, the said Fairbanks Banking [153] Company, by its board of Directors, declared a dividend of twenty per cent on its then outstanding capital stock of \$168,600, which dividend amounted to \$33,720.00, and which said sum was paid to the stockholders of said bank either in cash or by crediting the amount thereof upon notes owing by said stockholders to said bank.

LXI.

That at the time said dividend was so declared and paid, the said Fairbanks Banking Company did not have any surplus or undivided profits out of which

the same could be declared and paid.

LXII.

That said dividend was declared and paid in violation of the laws of the State of Nevada, and also in violation of the by-laws of the said Fairbanks Banking Company, and was wrongful and illegal.

LXIII.

That at the time said dividend was declared and paid, the defendants Wood, McGinn, Brumbaugh and John A. Jesson were members of the board of directors of the said Fairbanks Banking Company, and gave their consent thereto.

LXIV.

That on the 1st day of October, 1910, the said Fairbanks Banking Company and the said Washington-Alaska Bank of Washington combined, at which time the said Fairbanks Banking Company took over the assets of the said Washington-Alaska Bank of Washington and assumed and agreed to pay its outstanding liabilities; and thereafter the said Washington-Alaska Bank of Washington ceased to exist or do business as a bank, and the Fairbanks Banking Company, by amendment to its Articles of Incorporation, changed its name to Washington-Alaska Bank of Nevada, and continued thereafter to transact business under said name at said Fairbanks, Alaska, until the appointment of the receiver therefor.

LXV.

That pursuant to the agreement heretofore referred to between [154] the said Fairbanks Banking Company and the said partnership formerly existing between the said Barnette, Hill and Wood, the

said sum of \$200,000.00 to be paid to said Barnette was placed to his credit on the books of said corporation as a special deposit, and subsequently the entire sum thereof was paid to said Barnette in case and drawn out by him from the funds of said bank.

LXVI.

That the assets of the said bank now in the hands of the receiver are insufficient to pay its liabilities and the amount of such liabilities is more than \$470,000.00 in excess of the value of said assets.

Conclusions of Law.

Upon the foregoing findings of fact, the Court finds as conclusions of law:

1. That the defendants Wood, McGinn, Brumbaugh and Jesson are jointly and severally liable in the sum of \$33,720.00, by reason of the declaration and payment of the dividend upon the capital stock of the Fairbanks Banking Company on April 12, 1910;
2. That the defendant Jesson is liable in the sum of \$13,400.00 by reason of the surrender of shares of capital stock of said company, made between July 13, 1908, and September 12, 1908;
3. That the defendants Jesson and Hill are jointly and severally liable in the sum of \$1,500.00, for surrender of shares of capital stock of said Company, made between September 13, 1908, and October 13, 1908;
4. That the defendants Jesson, Hill, and Peoples are jointly and severally liable in the sum of \$1100.00, for surrenders of shares of capital stock,

made between October 14, 1908, and March 13, 1909;
[155]

5. That the defendants Jesson, Hill and Brumbaugh are jointly and severally liable in the sum of \$1100.00, for surrenders of shares of capital stock of said Company, made between March 14, 1909, and September 12, 1909;

6. That defendants Jesson, Brumbaugh and McGinn are jointly and severally liable in the sum of \$3000.00, for surrenders of capital stock of said Company, made between September 13, 1909, and October 12, 1909;

7. That defendants Jesson, McGinn and Brumbaugh are jointly and severally liable in the sum of \$1000.00, for surrenders of capital stock made between October 13, 1909, and January 18, 1910.

8. That the plaintiff is entitled to a decree and Judgment against the above-named defendants for the recovery of the sums above mentioned, and that as to the other defendants in this suit this action should be dismissed.

Dated June 11, 1914.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 12, page 944.

[Endorsed]: In the District Court for the District of Alaska, Fourth Judicial Division. F. G. Noyes, Receiver, vs. J. A. Jesson et al. Findings of Fact & Conclusions of Law. #1756. Filed in the District Court, Territory of Alaska, 4th Div., Jun. 11, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy.
[156]

*In the District Court for the Territory of Alaska,
Fourth Division.*

No. 1756.

F. G. NOYES, Receiver of the WASHINGTON-
ALASKA BANK, a Corporation,

Plaintiff,

vs.

J. A. JESSON et al.,

Defendants.

Decree.

BE IT REMEMBERED that on the 22d day of April, A. D. 1914, the above-entitled cause came on regularly for trial before the Court, without a jury, upon the issues as joined between the plaintiff and the defendants J. A. Jesson, R. C. Wood, J. A. Healey, E. R. Peoples, John L. McGinn, Ray Brumbaugh, James W. Hill, John A. Clark and George Preston. The Honorable F. E. Fuller, Judge of said Court, presiding. The plaintiff appeared in person and by his attorney O. L. Rider, and the said defendants R. C. Wood, James W. Hill, E. R. Peoples, and John L. McGinn, appearing by their attorneys A. R. Heilig and John L. McGinn, and the defendants J. A. Jesson, Ray Brumbaugh, J. A. Healey, John A. Clark, George Preston and E. R. Peoples appearing by their attorneys McGowan & Clark, and thereupon the respective parties, plaintiff and defendants, from day to day introduced their testimony in support of said issues until the 6th day of May, 1914, when all of said parties rested and the introduction of said testimony was closed, and thereupon the Court, after

hearing the arguments of counsel and after considering the pleadings and the testimony, and being fully advised in the premises, did, on the 11th day of June, 1914, make and file its findings of fact and conclusions of law upon said issues; and now, to wit, on this 15th day of June, 1914, the Court being fully advised in the premises, it is ordered, adjudged and decreed as follows to wit: [157]

I.

That the plaintiff have and recover of and from the defendants R. C. Wood, John L. McGinn, Ray Brumbaugh and J. A. Jesson, jointly and severally, the sum of \$33,720 by reason of the declaration and payment on April 12th, 1910, of the dividend upon the capital stock of the Fairbanks Banking Company set up in the complaint.

II.

That the plaintiff have and recover of and from the defendant J. A. Jesson the further sum of \$13,400.00 by reason of the surrender of shares of the capital stock of said company made between July 13, 1908, and September 12, 1908.

III.

That the plaintiff have and recover of and from the defendants J. A. Jesson and James W. Hill, jointly and severally, the further sum of \$1,500.00 by reason of the surrender of shares of the capital stock of said company made between September 13, 1908, and October 13, 1908.

IV.

That the plaintiff have and recover of and from the defendants J. A. Jesson, James W. Hill and E.

R. Peoples, jointly and severally, the further sum of \$1,100.00 by reason of the surrender of shares of the capital stock of said company made between October 14, 1908, and March 13, 1909.

V.

That the plaintiff have and recover of and from the defendants, J. A. Jesson, James W. Hill and Ray Brumbaugh, jointly and severally, the further sum of \$1,000.00 by reason of the surrender of shares of the capital stock of said company made between March 14, 1909, and September 12, 1909.

VI.

That the plaintiff have and recover of and from the defendants J. A. Jesson, Ray Brumbaugh and John L. McGinn, jointly and severally, the further sum of \$3,000.00 by reason of the surrender of shares of the capital stock of said company [158] made between September 13, 1909, and October 12, 1909.

VII.

That the plaintiff have and recover of and from the defendants J. A. Jesson, John L. McGinn and Ray Brumbaugh, jointly and severally, the further sum of \$1,000.00 by reason of the surrender of shares of the capital stock of said company made between October 13, 1909, and January 18, 1910.

VIII.

That the plaintiff take nothing as against the defendants J. A. Healey, John A. Clark and George Preston by reason of any of the matters and things set forth in the complaint herein and that this action be and the same is hereby dismissed as to said J. A. Healey, John A. Clark and George Preston.

IX.

That the plaintiff take nothing, further than as above specified, against the defendants, R. C. Wood, E. R. Peoples, John L. McGinn, J. A. Jesson, Ray Brumbaugh and James W. Hill, by reason of any of the matters and things set forth in the complaint herein, and that this action be and the same is hereby dismissed as to them in respect to all matters and things set up in the complaint herein, except as to the declaration and payment of said dividend and the surrenders of the shares of the capital stock of said company as above specified;

All of which is now finally ORDERED, ADJUDGED AND DECREED at the cost of the defendants R. C. Wood, E. R. Peoples, John L. McGinn, J. A. Jesson, Ray Brumbaugh and James W. Hill.

Let execution issue for the enforcement of above judgment and decree against the defendant R C. Wood, E. R. Peoples, John L. McGinn, J. A. Jesson, Ray Brumbaugh and James W. Hill.

Dated Fairbanks, Alaska, this 15th day of June, 1914.

F. E. FULLER,
Judge of the District Court, Territory of Alaska,
Fourth Division.

Entered in Court Journal No. 12, page 958. [159]

Service of copy accepted this 15 day of June, 1914.

McGOWAN & CLARK,
JOHN L. MCGINN,
A. R. HEILIG,
Attorneys for Defendants.

[Indorsed]: No. 1756. In the District Court for the Territory of Alaska, Fourth Division. F. G.

Noyes, Receiver of the Washington-Alaska Bank, Plaintiff, vs. J. A. Jesson et al., Defendants. Decree. Filed in the District Court, Territory of Alaska, 4th Div., Jun. 15, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. [160]

[Title of Court and Cause.]

Plaintiff's Bill of Exceptions.

BE IT REMEMBERED, that on the 18th day of May, 1914, the plaintiff duly served upon counsel for the defendants appearing herein his proposed Findings of Fact and Conclusions of Law in the above-entitled cause, and that the same were, on the 19th day of May, 1914, duly filed in said cause with the Clerk of this Court, wherein plaintiff requested that the Court make Conclusions of Law as follows: [161]

(1) The defendants John A. Jesson, James W. Hill and R. C. Wood are jointly and severally liable for the following items:

Overvaluation of Gold Bar Lumber Com-	
pany stock	\$75000
Purchase of Tanana Electric Company	
notes	27997.38
Purchase of other past due notes from the	
partnership which are still unpaid...	41911.56
Accrued interest on partnership notes paid	
to Barnette, Hill and Wood and which	
was not collected.....	7500
Balance of accrued interest paid to Bar-	
nette, Hill and Wood on partnership	
notes purchased	32142.81

Surrender of Wood's stock..... 13000

(2) The defendants J. A. Jesson, James W. Hill and John L. McGinn are jointly and severally liable for the following items:

Overvaluation of Washington-Alaska Bank stock 75000

(3) The defendants R. C. Wood, John L. McGinn, Ray Brumbaugh and John A. Jesson are jointly and severally liable for the following item:

Declaring and paying dividend of April 12, 1910, of Fairbanks Banking Company. 33720

(4) The following defendants are jointly and severally liable for surrenders of stock made between July 13, 1908, and September 12, 1908, namely, John A. Jesson and James W. Hill, in the sum of..... 13400

(5) The defendants John A. Jesson and James W. Hill are jointly and severally liable for surrenders of stock made between September 13, 1908, and October 13, 1908, in the sum of..... 1500

(6) The defendants John A. Jesson, James W. Hill and E. R. Peoples are jointly and severally liable for surrenders of stock made between October 14, 1908, and March 13, 1909, in the sum of..... 13100

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(7) The defendants John A. Jesson, James W. Hill and Ray Brumbaugh are jointly and severally liable for surrenders

of stock made between March 14, 1909, and September 12, 1909, in the sum of. 1000

(8) The defendants John A. Jesson, James W. Hill, Ray Brumbaugh and John L. McGinn are jointly and severally liable for surrenders of stock made between September 13, 1909, and October 12, 1909, in the sum of. 3000

(9) The defendants John A. Jesson, James W. Hill, John L. McGinn and Ray Brumbaugh are jointly and severally liable for surrenders of stock made between October 13, 1909, and January 18, 1910, in the sum of. 1000

(10) The defendants John A. Jesson, Ray Brumbaugh, John A. Clark, J. A. Healey and George Preston are jointly and severally liable for surrenders of stock made between January 19, 1910, and October 25, 1910, in the sum of. 6000

(11) The defendants J. A. Jesson, R. C. Wood, John L. McGinn and Ray Brumbaugh are jointly and severally liable for one year's interest upon the amount invested in the stock of the First National Bank and sold to McGinn and Wood. 10000

Let decree be entered against the above-named defendants jointly and severally for the above amounts in the manner above stated, and for the costs of this action. [163]

That thereafter, to wit, on the 22d day of May, 1914, the said defendants appearing herein through

their attorneys, John L. McGinn, A. R. Heilig, and McGowan & Clark, duly served upon counsel for plaintiff their proposed Findings of Fact and Conclusions of Law in said cause, and the same were on the 23d day of May, 1914, duly filed in said cause with the clerk of this court, wherein said defendants proposed as Findings of Fact No. 36 and No. 51 thereof, the following, to wit:

XXXVI.

“That upon the 18th day of November, 1908, Strandberg Brothers were the owners of 100 shares of the outstanding capital stock of said Fairbanks Banking Company, Emma Strandberg was the owner of 10 shares, and B. E. Johnson was the owner of 10 shares.

That said stock was taken in part payment of a loan that the bank had heretofore made to said Strandberg Brothers and said Johnson, who were mining copartners, and the bank also received at said time the further sum of \$4,000.00 in cash, which fully paid said loan. That said transaction amounted to the taking of stock for a pre-existing debt, rather than the purchase of stock by the Board of Directors. That said directors believed at said time that said loan was precarious; and said directors, in taking said stock in partial satisfaction of said loan, did so in good faith and for the best interest of the corporation.”

LI.

“That a short time prior to the 13th day of October, 1910, John L. McGinn, as a stockholder of the Washington-Alaska Bank, formerly the Fairbanks

Banking Company, demanded the right to inspect its books and papers, and threatened that unless this right was granted him immediately, to make application for an order permitting him to do so and for the appointment of a receiver of the said Washington-Alaska Bank. That the directors of the Washington-Alaska Bank, fearing that information obtained by such an investigation would be used by said McGinn in promoting the interests of the First National Bank in its business, and that if such information was refused and any litigation was started it would impair public confidence in the Washington-Alaska Bank, and perhaps start a run of its customers and depositors on said bank, acting under this belief, authorized the cashier to loan a purchaser sufficient funds to pay for the stock of said McGinn; one of the directors stating at said time that he had a purchaser who would be willing to purchase said stock for the sum of \$6,000.00 but it would be necessary for him to borrow money to complete said purchase; that, as the matter was urgent and the purchaser was not immediately available, the cashier purchased the stock in his own name and gave his note to the bank for the amount thereof and paid to said John L. McGinn the sum of \$6000 for his 100 shares of capital stock. That thereafter, and on or about the 25th day of October, 1910, said cashier, without the knowledge of any of the directors, cancelled his note and charged the amount thereof to the bank, and surrendered his stock to the bank, and the stock was thereafter held, with other treasury stock of the company."

That thereafter, to wit, on the 25th day of May, 1914, [164] the plaintiff duly served on counsel for said defendants and duly filed in said cause with the clerk of said court, his objections to the Findings of Fact and Conclusions of Law proposed by said defendant, in which he objected to said proposed Findings of Fact No. 36 and No. 51, being plaintiff's objections No. 33 and No. 46, which said objections are as follows, to wit:

“No. 33.—Plaintiff objects to the proposed Findings of Fact number XXXVI, for the reason that the same is not supported by the evidence, is contrary to the evidence, and is argumentative, narrative and evidentiary.

No. 46.—Plaintiff objects to the proposed Findings of Fact number LI, for the reason that the same is not supported by the evidence, is contrary to the evidence, is evidentiary, narrative and argumentative, and for the further reason that the same is an incomplete statement of the matters therein referred to as shown by the evidence.”

That thereafter said Findings of Fact and Conclusions of Law proposed by the plaintiff and the defendants respectively, together with said objections thereto, were duly presented and argued to the Court in open court by counsel for the respective parties.

That the substance of the whole of the testimony introduced and received on the trial of said cause respecting the matter of the surrender of the said stock of the said McGinn is as follows, to wit:

That, at the time when the defendants George

Preston, J. A. Healey, and John A. Clark were directors of the said Washington-Alaska Bank and about the month of October, 1910, and prior to the twelfth day of said month, John L. McGinn, who had theretofore been a director of said Washington-Alaska Bank, formerly Fairbanks Banking Company, and who had for a number of years been attorney for said bank, and was the owner of 100 shares of the capital stock thereof, notified the vice-president and manager of said bank, J. Albert Jackson, that he intended to exercise his rights as a stockholder to examine all the affairs of said bank and would do so, and further stated that he would sell his stock for the sum of \$6000.00. That the stock of said John L. McGinn was of the [165] par value of \$10,000.00; that he had received \$2,000.00 in dividends and that he was willing to sell said stock for the sum of \$6000.00; that he was one of the owners of the First National Bank of Fairbanks, having recently acquired that property, and that he needed all the money he could get; and that, as the First National Bank was a rival bank of the Washington-Alaska Bank, he did not desire to have any stock in the said Washington-Alaska Bank.

That an intense rivalry existed between said banks at said time, and there was keen competition in the purchase of gold-dust and the acquiring of banking business, and said John L. McGinn notified said J. Albert Jackson vice-president and manager of the Washington-Alaska Bank, that he would exercise his right as a stockholder to demand an inspection of the books of said Washington-Alaska Bank and

other records, thus enabling him to secure information respecting the clients, customers, creditors and debtors of the said Washington-Alaska Bank that could be by him used to the advantage of said First National Bank and greatly to the detriment of said Washington-Alaska Bank.

That said demand and said statements were by said J. Albert Jackson reported to the Board of Directors or the greater part thereof, and an informal discussion was had by a number of said directors as to what was advisable to be done; that it was also reported by said vice-president and manager, J. Albert Jackson, that said McGinn had threatened that if his demand for an inspection of the books and records of said bank was not complied with he would bring a suit against the said Washington-Alaska Bank as a stockholder thereof, asking for the appointment of a receiver, on the ground that, as a stockholder he was refused information that he was entitled to receive, and on the further ground that the officers of said Washington-Alaska Bank were mismanaging said bank; in that they were paying more for gold-dust than they were justified in paying, and for other acts. [166]

That D. H. Jonas, one of the directors of said bank, stated to the directors, including said defendants, that he was satisfied that he could find a purchaser for said stock at the said price of \$6,000.00; that thereafter and on the 12th day of October, 1910, at the regular monthly meeting of the directors of the Washington-Alaska Bank, the matter was considered by the board of directors and it was then reported

by said D. H. Jonas that he had not been able to see the prospective purchaser, but that he was satisfied that said prospective purchaser would take said stock and would probably require a loan from the bank, as he did not at that time have sufficient money to make said purchase; that it was again reported by the vice-president and manager that said John L. McGinn was insistent on said matter and demanded that it be closed at once.

That at said meeting of 12th October, 1910, it was moved, seconded and duly carried that "The officers extend a loan to the party to whom McGinn would sell and retain the stock in the bank as collateral." That it was reported at the said meeting by said D. H. Jonas that it might be some days before the prospective purchaser could be reached, and it was then decided by said Board of Directors, that, if it became necessary to prevent action being taken by said John L. McGinn, F. W. Hawkins, the cashier of said bank, be loaned the money necessary to pay for the stock, to wit, the sum of \$6,000.00, and that said stock be held as collateral security for said loan, and that, when the prospective purchaser could be communicated with, a new loan could be made to said purchaser and the stock be issued to said purchaser and be held by the bank as collateral security for such new loan.

That, in accordance with said agreement, said F. W. Hawkins borrowed from the said bank the sum of \$6,000.00 which he paid to said John L. McGinn for said stock and said stock was assigned [167] by the said McGinn in blank and said F. W.

Hawkins executed his note to said bank for said sum.

That thereafter, and without the knowledge, consent or approval of the Board of Directors, or of said defendants as members of said board, said F. W. Hawkins cancelled his note and returned said stock to the bank, and said defendants knew nothing of said transaction until after said bank was closed.

That the directors of said Washington-Alaska Bank had with them employees whom they trusted and who were under bond, and who had theretofore, so far as said defendants had knowledge or information, strictly performed the orders given to them by the Board of Directors; that the Board of Directors had no information concerning the subsequent action of said F. W. Hawkins with regard to said stock until after the suspension of said Washington-Alaska Bank.

That said directors refused in behalf of said bank to purchase said stock from said John L. McGinn, and did not purchase said stock, and the surrender of said note by said F. W. Hawkins was wrongful and without authority.

That no information was furnished to said board of directors that would lead them to believe that the officers of said bank had done or performed any act or thing contrary to the instructions given, and said defendants were never informed that the purchaser whom said D. H. Jonas claimed to be available had not purchased said stock.

That at the time it was voted to loan said money to the purchaser of said stock, said stock was con-

sidered by said Board of Directors to be worth a sum in excess of \$6,000.00 and said loan was considered a perfectly safe loan, and said directors had no reason to believe that said bank was not in a perfectly solvent condition or that the McGinn stock was not worth the full sum of \$6,000.00. [168]

That had said McGinn been permitted the rights claimed by him as a stockholder and examined into the affairs of said bank, with a view of ascertaining its clients, customers, creditors and debtors, it would have caused said bank great and irreparable damage and would have resulted to the benefit and advantage of the First National Bank, of which said John L. McGinn was one of the principal owners.

That the substance of the whole of the testimony offered and received on the trial concerning the surrender of said stock of the said Strandberg Brothers, Emma Strandberg and B. E. Johnson was that the said Strandberg Brothers and the said B. E. Johnson were mining copartners and that the said Emma Strandberg was the wife of one of the said Strandbergs, and that on the 5th day of November, 1908, the said Strandberg Brothers were the owners of 100 shares of the capital stock of said bank of the par value of \$10,000.00, and the said Emma Strandberg was the owner of 10 shares of said stock of the par value of \$1,000.00, and the said B. E. Johnson was the owner of 10 shares of said stock of the par value of \$1,000.00; that on the 5th day of November, 1908, it was resolved by the executive committee, the defendant Hill being present as a member thereof, that a loan of \$15,000.00 be made to Strandberg

Brothers on the security of their 110 shares of Fairbanks Banking Company stock and notes aggregating \$2,500.00, and that thereafter, on November 12, 1908, at a meeting of the Board of Directors at which the defendants, J. A. Jesson, E. R. Peoples and James W. Hill were present, the minutes of the meeting of the executive committee held on said November 5, 1908, were read, and on motion duly made and seconded, were approved, ratified and passed as the action of said board. That pursuant to said proceedings a note in the sum of \$17,050.00 payable to said bank, was executed by David Strandberg and Strandberg Brothers & Johnson, dated November 5th, 1908, due May 31, 1909, and the proceeds thereof in the sum of \$15,000.00 was placed to the credit of Strandberg Brothers & Johnson in their deposit account, and the said note of \$17,050.00 was secured by the said stock of the said Strandberg [169] Brothers and Johnson as collateral.

That at a meeting of said executive committee held on November 18, 1908, the defendants, J. A. Jesson and James W. Hill being present as members thereof, the matter of taking over the Strandberg Brothers and Johnson stock was discussed, and the minutes thereof further reciting that "In taking over this stock the proceeds were to apply to the taking up of the loan of Strandberg Brothers to the bank. It was moved by Ryan, seconded by Jonas, that Mr. J. A. Jesson take up the stock of Strandberg Brothers and Johnson at par on behalf of the bank. Motion carried." That at a meeting of the Board of Directors held on December 12, 1908, at

which the defendants James W. Hill, E. R. Peoples and J. A. Jesson were present as members thereof, the minutes of said meeting of the executive committee held on said November 18, 1908, were read, and on motion duly made and seconded were approved, ratified and passed as the action of the board.

That on November 19, 1908, said note was cancelled and surrendered to the makers thereof, and said bank took up and cancelled the said stock of the said Strandberg Brothers and the said B. E. Johnson, aggregating \$11,000.00 as aforesaid, and in addition thereto received from said Strandberg Brothers and Johnson the sum of \$4,000.00 in cash. Said stock was charged to the account of Treasury stock and the deposit account of Strandberg Brothers & Johnson was credited \$15,000.00 and subsequently the same was withdrawn by them. Afterwards, on November 25, 1908, the deposit account of Emma Strandberg was credited \$1,000.00 being the par value of her said stock, and her 10 shares of stock cancelled and charged to Treasury stock, and the amount so credited to her account was by her subsequently, to wit, on February 16, 1909, drawn out by her. That said Board of Directors believed, at the time said stock was taken up, that said loan was precarious, and said directors in taking said stock in partial satisfaction of said loan did so in good faith and in the belief that it was [170] for the best interest of said corporation. That in order to get the said Strandberg Brothers & Johnson to take up said note and make said cash payment as afore-

said, it was necessary to include in said settlement the said stock of the said Emma Strandberg.

That on the 12th day of June, 1914, the Court made and filed in said cause with the clerk of said court, his Findings of Fact and Conclusions of Law in which the Court granted defendants' proposed Findings of Fact No. 36 and No. 51, the same being Findings of Fact by the Court No. 45 and No. 49, and denied plaintiff's said objections No. 33 and No. 46, and denied plaintiff's said proposed Conclusions of Law numbers 1, 2, 10 and 11 entirely, and denied plaintiff's proposed Conclusions of Law No. 6 in so far as the same relates to the surrender of \$12,000.00 worth of stock.

That on the 15th day of June, 1914, the Court entered decree in the above-entitled action in conformity with said Conclusions of Law made by the Court.

AND NOW, in order that the exceptions of the plaintiff duly taken at the time of said proceedings respecting the foregoing matters were had and done, may be preserved of record.

[Exceptions.]

BE IT REMEMBERED, that said exceptions are as follows, to wit:

I.

To the granting of defendant's said proposed Findings of Fact number 36, and to the making of said Finding of Fact number 45 by the Court, the plaintiff at the time duly excepted and still excepts for the reason that the same is contrary to the evidence, and is an incomplete finding as to the matter

of the surrender of said shares of stock owned by the said Strandberg Brothers, the said Emma Strandberg and the said B. E. Johnson in that it fails to find that at the time that the said note of the said Strandberg Brothers was given the said shares of stock of the said Strandberg Brothers were accepted by the bank as collateral security therefor. [171]

II.

To the granting of the defendants' said proposed Findings of Fact number 51, and to the making of said Finding of Fact number 49 by the Court, plaintiff at the time duly excepted and still excepts, for the reason that the same is contrary to the evidence, and an incomplete finding of fact as to the matter of the surrender of said stock of the said McGinn in that it fails to find that the cashier of said bank, one F. W. Hawkins, in the matter of the taking up of the stock, and in borrowing from said bank the money which he paid to the said McGinn therefor, and in executing to said bank his note for said money, acted at the direction of the Board of Directors of said bank and thereby became the agent of said bank in said matter.

III.

To the denial of plaintiff's proposed Conclusions of Law numbered one plaintiff duly excepted at the time and still excepts, for the reason that the same is contrary to the evidence, contrary to the facts found by the Court, and contrary to law.

IV.

To the denial of that portion of plaintiff's pro-

posed Conclusions of Law number one, which is as follows: "Purchase of Tanana Electric Company notes \$27,997.38," plaintiff duly excepted at the time and still excepts for the reason that the same is contrary to the facts found by the Court, and contrary to law.

V.

To the denial of that portion of plaintiff's proposed Conclusions of Law number one which is as follows: "Purchase of other notes past due, from the partnership of \$41,911.56," plaintiff duly excepted at the time and still excepts for the reason that the same is contrary to the facts found by the Court, and contrary to law.

VI.

To the denial of that portion of plaintiff's proposed Conclusions of Law number one which is as follows: "Accrued interest on partnership notes paid to Barnette, Hill and Wood [172] and which was not collected, \$7,500.00," plaintiff duly excepted at the time and still excepts for the reason that the same is contrary to the facts found by the Court and contrary to law.

VII.

To the denial of that portion of plaintiff's proposed Conclusions of Law number one, which is as follows: "Balance of accrued interest paid to Barnette, Hill and Wood on partnership notes purchased, \$32,142.81," plaintiff duly excepted at the time and still excepts for the reason that the same is contrary to the facts found by the Court, and contrary to law.

VIII.

To the denial of that portion of plaintiff's proposed Conclusions of Law number one, which is as follows: "Surrender of Wood's stock, \$13,000.00," plaintiff duly excepted at the time and still excepts for the reason that the same is contrary to the facts found by the Court, and contrary to law.

IX.

To the denial of plaintiff's proposed Conclusions of Law number six in so far as the same relates to the surrender of \$12,000.00 worth of stock, being the stock of Strandberg Brothers, \$10,000, Emma Strandberg, \$1,000, B. E. Johnson, \$1,000, plaintiff duly excepted at the time and still excepts for the reason that the same is contrary to the facts as found by the Court, contrary to the evidence, and contrary to law.

X.

To the denial of plaintiff's proposed Conclusions of Law number ten, plaintiff duly excepted at the time and still excepts for the reason that the same is contrary to the facts found by the Court, and contrary to law.

XI.

To the denial of plaintiff's proposed Conclusions of Law number eleven, plaintiff duly excepted at the time and still excepts for the reason that the same is contrary to the facts found by the Court and contrary to law. [173]

XII.

To the eighth Conclusion of Law by the Court in so far as it dismisses plaintiff's action; plaintiff

duly excepted at the time and still excepts for the reason that the same is contrary to the facts found by the Court, and contrary to law.

XIII.

To paragraph VIII of the decree entered herein; plaintiff duly excepted at the time and still excepts for the reason that the same is contrary to the facts found by the Court, and contrary to law.

XIV.

To paragraph IX of the decree entered herein; plaintiff duly excepted at the time and still excepts for the reason that the same is contrary to the facts found by the Court and contrary to law.

AND NOW, in furtherance of justice and in order that the foregoing matters may become a part of the record in this case and within the time allowed by law to prepare, serve, file and have settled his Bill of Exceptions in this case, the plaintiff herewith presents the foregoing Bill of Exceptions in the above entitled cause and prays that the same may be settled, signed and allowed by the Judge of this court in the manner prescribed by law.

O. L. RIDER,

Attorney for Plaintiff. [174]

[Title of Court and Cause.]

**Order Allowing and Settling Plaintiff's Bill of
Exceptions.**

And now, on the 6th day of July, 1914, the above-named plaintiff, in the manner prescribed by law and the practice of this court, having presented to

the Court for allowance and settlement his Bill of Exceptions in the above-entitled cause, the plaintiff appearing by his attorney, O. L. Rider, and the defendants J. A. Jesson, James W. Hill, R. C. Wood, John L. McGinn, Ray Brumbaugh, E. R. Peoples, John A. Clark, J. A. Healey and George Preston appearing by John L. McGinn, their attorney:

And it appearing to the Court that said Bill of Exceptions has been heretofore, and within the time allowed by law, served upon the attorneys for said defendants in due form, and that the same has been filed with the clerk of this court within the time allowed by law, and that the time for filing amendments thereto has expired, and that said Bill of Exceptions is true and correct in all particulars and contains a true and correct statement of the exceptions taken in due time by the plaintiff together with so much of the proceedings had and done therein as is necessary to explain said objections and each of them, and also contains a true, full and correct copy of the Conclusions of Law asked for by the plaintiff in said cause, and a true, full and correct copy of Findings of Fact Nos. 36 and 51 asked for by the defendants, and a true, full and correct copy of plaintiff's objections thereto numbered 33 and 46, together with a true, full and correct statement of the rulings of the Court on said proposed [175] Conclusions of Law, Findings of Fact and objections thereto;

And the Court being fully advised in the premises, IT IS ORDERED that the foregoing Bill of Exceptions be, and the same is hereby allowed, settled, approved and signed as Plaintiff's Bill of Excep-

tions in said cause, and the same is hereby ordered filed with the clerk of this court and made a part of the record in this cause.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 2, page 24, at Iditarod, Alaska.

Entered in Court Journal No. 13, page 4.

Service of copy of the within Plaintiff's Bill of Exceptions and Order of Court allowing and settling the same is hereby acknowledged this 22 day of June, 1914.

J. L. MCGINN,
A. R. HEILIG,
McGOWAN & CLARK,
Attorneys for Defendants.

[Endorsed]: No. 1756. F. G. Noyes, Receiver, etc., Plaintiff, vs. J. A. Jesson et al., Defendants. Plaintiff's Bill of Exceptions. (Proposed.) Filed in the District Court, Territory of Alaska, 4th Div. Jun. 22, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. Filed in the District Court, Territory of Alaska, 4th Div. Jul. 6, 1914. Angus McBride, Clerk. [176]

[Title of Court and Cause.]

**Petition for Allowance of Appeal and Order
Granting Same.**

To the Honorable Charles E. Bunnell, District Judge:

The above-named plaintiff, F. G. Noyes, Receiver of Washington-Alaska Bank, a corporation or-

ganized under the laws of the State of Nevada, feeling himself aggrieved by the decree made and entered in this cause on the 15th day of June, A. D. 1914, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, California; and your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

O. L. RIDER,

Attorney for Plaintiff.

Service of the foregoing petition for allowance of appeal is hereby admitted at Fairbanks, Alaska, on the 28 day of January, A. D. 1915, by receipt of a copy thereof.

McGOWAN & CLARK,

Attys. for J. A. Jesson, Hill, Brumbaugh, Clark & Preston, Defdts.

JOHN L. McGINN and

A. R. HEILIG,

Attorneys for Defendants McGinn, Wood, Peoples & Healey. [177]

[Order Allowing Appeal, etc.]

The foregoing petition is granted and the appeal allowed upon giving bond for costs conditioned as required by law, in the sum of \$500.00.

CHARLES E. BUNNELL,

Judge of the District Court for the Territory of
Alaska, Fourth Judicial Division.

Entered in Court Journal No. 13, page 29.

[Indorsed]: No. 1756. F. G. Noyes, Receiver, etc., Plaintiff, vs. J. A. Jesson et al., Defendants. Petition for Allowance of Appeal and Order Granting Same. Filed in the District Court, Territory of Alaska, 4th Div. Jan. 28, 1915. Angus McBride, Clerk. [178]

[Title of Court and Cause.]

Order Allowing Appeal.

On motion of O. L. Rider, attorney for the above-named plaintiff, it is ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree heretofore filed and entered herein be, and the same is hereby, allowed and that certified transcript of the record, proceedings and papers herein be forthwith transmitted to the United States Circuit Court of Appeals.

It is further ordered that the bond for costs on appeal be fixed at the sum of \$500.00, conditioned as provided by law.

Dated at Fairbanks, Fourth Judicial Division,
Territory of Alaska, this 28th day of January, 1915.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 29.

Service of the foregoing order allowing appeal
admitted and a true copy thereof received this 28 day
of January, 1915.

McGOWAN & CLARK,

Attys. for Defdts. J. A. Jesson, Hill, Brumbaugh,
Clark & Preston.

JOHN L. MCGINN, and

A. R. HEILIG,

Attorneys for Defendants McGinn, Wood, Peoples
& Healey. [179]

[Indorsed]: No. 1756. F. G. Noyes, Receiver, etc.,
Plaintiff, vs. J. A. Jesson et al., Defendants. Order
Allowing Appeal. Filed in the District Court, Ter-
ritory of Alaska, 4th Div. Jan. 28, 1915. Angus
McBride, Clerk. [180]

[Title of Court and Cause.]

Plaintiff's Assignments of Error.

And now, on this 28 day of January, A. D. 1915,
comes the plaintiff by his attorney, O. L. Rider, and
says that the decree entered in the above cause on the
15th day of June, A. D. 1914, is erroneous and unjust
to the said plaintiff, and he files with his petition for
appeal the following assignments of error upon
which he will rely on his appeal from the decree made
by this Honorable Court on the 15th day of June,
A. D. 1914, in the above-entitled cause:

I.

The Court erred in granting defendants' proposed finding of fact No. XXXVI, and in adopting the same over plaintiff's objection as finding of fact XLV by the Court, which is as follows:

"That upon the 18th day of November, 1908, Strandberg Brothers were the owners of 100 shares of the outstanding capital stock of said Fairbanks Banking Company, Emma Strandberg was the owner of 10 shares, and B. E. Johnson was the owner of 10 shares.

That said stock was taken in part payment of a loan that the bank had theretofore made to said Strandberg Brothers and said Johnson, who were mining copartners, and the bank also received at said time the further sum of \$4,000 in cash, which fully paid said loan.

That said transaction amounted to the taking of stock for a pre-existing debt, rather than the purchase of stock by the Board of Directors.

That said directors [181] believed at said time that said loan was precarious, and said directors, in taking said stock in partial satisfaction of said loan, did so in good faith and believing it to be for the best interests of the corporation."

II.

The Court erred in granting defendants' proposed finding of fact No. LI and in adopting the same over plaintiff's objection as finding of fact No. XLIX by the Court, which is as follows:

"That a short time prior to the 13th day of October, 1910, John L. McGinn, as a stockholder of

the Washington-Alaska Bank, formerly the Fairbanks Banking Company, demanded the right to inspect its books and papers, and threatened that, unless this right was granted him immediately, to make application for an order permitting him to do so and for the appointment of a receiver of the said Washington-Alaska Bank.

That the directors of the Washington-Alaska Bank, fearing that information obtained by such an investigation would be used by said McGinn in promoting the interests of the First National Bank in its business, and that if such information was refused and any litigation was started it would impair the public confidence in the Washington-Alaska Bank, and perhaps start a run of its customers and depositors on said bank, acting under this belief, authorized the cashier to loan a purchaser sufficient funds to pay for the stock of said McGinn; one of the directors stating at said time that he had a purchaser who would be willing to purchase said stock for the sum of \$6,000, but it would be necessary for him to borrow money to complete said purchase; that as the matter was urgent and the purchaser was not immediately available, the cashier purchased the stock in his own name and gave his note to the bank for the amount thereof, and paid to said John L. McGinn the sum of \$6,000.00 for his 100 shares of capital stock.

That thereafter, and on or about the 25th day of October, 1910, said cashier, without the knowledge of any of the directors, cancelled his note and charged the amount thereof to the bank, and surrendered the stock to the bank, and the stock was thereafter held,

with other treasury stock of the company.”

III.

The Court erred in denying plaintiff’s proposed conclusion of law No. 1, which is as follows:

“The defendants John A. Jesson, James W. Hill, and R. C. Wood are jointly and severally liable for the following items:

Overvaluation of Gold Bar Lumber Company stock.....	\$75000.
Purchase of Tanana Electric Company notes,.....	27997.38
Purchase of other past due notes from the partnership which are still unpaid,...	41911.56
Accrued interest on partnership notes paid to Barnette, Hill and Wood and which was not collected,.....	7500.
Balance of accrued interest paid to Barnette, Hill and Wood partnership.....	
notes purchased.....	32142.81

[182]

Surrender of Wood’s stock.....	13000.00
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IV.

The Court erred in denying that portion of plaintiff’s proposed conclusion of law No. 1, which is as follows:

“Purchase of Tanana Electric Company notes.....\$27997.38”

V.

The Court erred in denying that portion of plaintiff’s proposed conclusion of law No. 1, which is as follows:

“Purchase of other notes past due from the partnership.....\$41911.56”

VI.

The Court erred in denying that portion of plaintiff's proposed conclusion of law No. 1, which is as follows:

“Accrued interest on partnership notes
paid to Barnette, Hill and Wood
and which was not collected.....\$7500.”

VII.

The Court erred in denying that portion of plaintiff's proposed conclusion of law No. 1, which is as follows:

“Balance of accrued interest paid to
Barnette, Hill and Wood on
partnership notes purchased....\$32142.81”

VIII.

The Court erred in denying that portion of plaintiff's proposed conclusion of law No. 1, which is as follows:

“Surrender of Wood's stock,.....\$13000.”

IX.

The Court erred in denying plaintiff's proposed conclusion of law No. 6 in so far as the same relates to the surrender of \$12,000 worth of stock, being the stock of Strandberg Brothers \$10,000, Emma Strandberg, \$1,000, B. E. Johnson, \$1,000, which said conclusion of law is as follows:

“The defendants John A. Jesson, James W. Hill and E. R. Peoples are jointly and severally liable for surrenders of stock made between October 14, 1908, and March 13, 1909, in the sum of \$13,100.00.”

X.

The Court erred in denying plaintiff's proposed conclusion of law No. 10, which is as follows:

"The defendants John A. Jesson, Ray Brumbaugh, John A. Clark, J. A. Healey, and George Preston are jointly and severally liable for surrenders of stock made between January 19, 1910, and October 25, 1910, in the sum of \$6,000.00."

XI.

The Court erred in denying plaintiff's proposed conclusion of law No. 11, which is as follows:

"The defendants J. A. Jesson, R. C. Wood, John L. McGinn and Ray Brumbaugh are jointly and severally liable for one year's interest upon the amount invested in the stock of the First National Bank and sold to McGinn and Wood \$10,000.00."

XII.

The Court erred in making that portion of conclusion of law No. 8 by the Court, which is as follows:

"and that as to the other defendants in this suit this action should be dismissed."

XIII.

The Court erred in making and entering paragraph 8 of the decree herein, which is as follows:

"That the plaintiff takes nothing as against the defendants J. A. Healey, John A. Clark and George Preston by reason of any of the matters and things set forth in the complaint herein and that this action be and the same is hereby dismissed as to said J. A. Healey and John A. Clark and George Preston."

XIV.

The Court erred in making and entering para-

graph 9 of the decree herein, which is as follows:

“That the plaintiff take nothing, further than as above specified, against the defendants R. C. Wood, E. R. Peoples, John L. McGinn, J. A. Jesson, Ray Brumbaugh and James W. Hill, by reason of any of the matters and things set forth in the complaint herein, and that this action be and the same is hereby dismissed as to them in respect to all matters and things set up in the complaint herein, except as to the declaration and payment of said dividend and the surrender of the shares of the capital stock of said company as above specified.” [184]

XV.

The Court erred in refusing to enter judgment and decree in favor of plaintiff and against the defendants, J. A. Jesson, James W. Hill and E. R. Peoples, on account of the surrender of \$12,000.00 worth of stock between October 14, 1908, and March 13, 1909, being the stock of Strandberg Brothers, \$10,000, Emma Strandberg, \$1,000.00, B. E. Johnson, \$1,000, and in dismissing plaintiff's action therefor.

XVI.

The Court erred in refusing to enter judgment and decree in favor of the plaintiff and against the defendants, J. A. Jesson, Ray Brumbaugh, John A. Clark, J. A. Healey and George Preston in the sum of \$6,000.00 for surrenders of stock made between January 19, 1910, and October 25, 1910, and in dismissing plaintiff's action therefor.

XVII.

The Court erred in refusing to make and enter decree and judgment against the defendants J. A.

Jesson, James W. Hill and R. C. Wood in the sum of \$27,997.38, on account of the purchase of the Tanana Electric Company notes.

XVIII.

The Court erred in refusing to make and enter judgment and decree in favor of the plaintiff and against the defendants, J. A. Jesson, James W. Hill and R. C. Wood in the sum of \$41,911.56 on account of the purchase from the partnership of notes other than said Tanana Electric Company notes, which were past due at the time of purchase and are still unpaid.

XIX.

The Court erred in refusing to make and enter judgment in favor of the plaintiff and against the defendants, J. A. Jesson, James W. Hill and R. C. Wood, in the sum of \$7,500.00, on account of accrued interest on notes purchased from the partnership, which was paid to Barnette, Hill and Wood, and which is still uncollected. [185]

XX.

The Court erred in refusing to make and enter judgment in favor of the plaintiff and against the defendants J. A. Jesson, James W. Hill and R. C. Wood, in the sum of \$32,142.81 on account of the balance of accrued interest paid to Barnette, Hill and Wood on partnership notes purchased.

XXI.

The Court erred in refusing to make and enter judgment in favor of the plaintiff and against the defendants J. A. Jesson, James W. Hill and R. C. Wood, in the sum of \$13,000.00 on account of the sur-

render of Wood's stock.

WHEREFORE, plaintiff prays that said decree be corrected in the foregoing particulars so as to grant him the relief prayed for by the petition, and that said Court of Appeals shall render a proper decree on the record and that he have such other and further relief as shall be equitable in the premises.

O. L. RIDER,

Attorney for Plaintiff.

Received copy of foregoing assignment of error
Jan. 28, 1915.

A. R. HEILIG and

JOHN L. MCGINN,

Attys. for McGinn, Wood, Peoples & Healey.

McGOWAN & CLARK,

Attys. for Defdts. J. A. Jesson, Hill, Brumbaugh,
Clark & Preston.

[Indorsed]: No. 1756. F. G. Noyes, Receiver, etc.,
Plaintiff, vs. J. A. Jesson et al., Defendants. Plain-
tiff's Assignments of Error. Filed in the District
Court, Territory of Alaska, 4th Div. Jan. 28, 1915.
Angus McBride, Clerk. [186]

[Title of Court and Cause.]

[Citation (Copy).]

United States of America,
Territory of Alaska,—ss.

The President of the United States of America, to
R. C. Wood, John L. McGinn, Ray Brumbaugh,
J. A. Jesson, James W. Hill, E. R. Peoples, J.
A. Healey, John A. Clark and George Preston,
and Each of You, Greeting:

You, and each of you, are hereby cited and admonished to appear and be at the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within thirty days from the date hereof, pursuant to an order allowing an appeal made and entered in the above-entitled cause, in which F. G. Noyes, Receiver of the Washington-Alaska Bank, a corporation, is plaintiff, and J. A. Jesson, D. H. Jonas, David Yarnell, Dan Ryan, John L. McGinn, R. C. Wood, C. J. Robinson, W. H. McMullen, C. E. Claypool, Robert Sheppard, Hans Stark, John Flygar, John P. Anderson, E. R. Peoples, James W. Hill, Ray Brumbaugh, J. A. Jackson, John A. Clark, J. A. Healey, George Preston, B. R. Dusenberry and L. N. Jesson, are defendants, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 28th day of January, One Thousand Nine Hundred and Fifteen.

CHARLES E. BUNNELL,
District Judge for the District Court of Alaska,
Fourth Judicial Division.

[Seal]

Attest: ANGUS McBRIDE,

Clerk.

Service of the foregoing citation and receipt of copy thereof, is hereby accepted and acknowledged

this 29 day of January, A. D. 1915.

McGOWAN & CLARK,
Attys. for Defdts. J. A. Jesson, Hill, Brumbaugh,
Clark & Preston.

JOHN L. McGINN and
A. R. HEILIG,
Attys. for Defendants McGinn, Wood, Peoples and
Healey. [187]

[Indorsed]: No. 1756. F. G. Noyes, Receiver, etc.
Plaintiff, vs. J. A. Jesson et al., Defendants. Cita-
tion. Filed in the District Court, Territory of
Alaska, 4th Div. Jan. 28, 1915. McBride, Clerk.
[188]

[Title of Court and Cause.]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS,
that we, F. G. Noyes, Receiver of the Washington-
Alaska Bank, a corporation, as principal, and G. W.
Pennington and A. Bruning, as sureties, are held and
firmly bound unto the defendants in the full sum of
five hundred (\$500.00) dollars, to be paid to said de-
fendants, to which payment well and truly to be
made we bind ourselves, our heirs, executors and ad-
ministrators, jointly and severally, firmly by these
presents.

Sealed with our seals and dated this 20th day of
February, 1915.

WHEREAS, lately at a term of the District Court
in the Territory of Alaska, Fourth Division, in a suit
pending in said Court between F. G. Noyes, receiver
of the Washington-Alaska Bank, a corporation organ-

ized under the laws of the State of Nevada, as plaintiff and J. A. Jesson, D. H. Jonas, David Yarnell, Dan Ryan, John McGinn, R. C. Wood, C. J. Robinson, M. H. McMullen, C. E. Claypool, Robert Sheppard, Hans Stark, John Flygar, John P. Anderson, E. R. Peoples, James W. Hill, Ray Brumbaugh, J. A. Jackson, John A. Clark, J. A. Healey, George Preston, B. R. Dusenbury and L. N. Jesson, as defendants, a decree was rendered in favor of the plaintiff in part and against the plaintiff in part, and said plaintiff having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals to reverse the decree in the aforesaid cause in certain particulars, and a citation is about to be issued citing and admonishing [189] the defendants J. A. Jesson, E. R. Peoples, James W. Hill, Ray Brumbaugh, R. C. Wood, and John L. McGinn to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in San Francisco, California, and

WHEREAS, the above-named plaintiff has obtained an order from said Court that the bond on appeal be fixed in the sum of five hundred dollars for costs and damages on appeal.

Now, the condition of the above obligation is such that if the said plaintiff shall prosecute his said appeal to effect and shall answer all damages and costs that may be awarded against him, if he fails to make his plea good, then this obligation is to be void, other-

wise to remain in force and effect.

F. G. NOYES,

By R. F. ROTH, Atty.,

Principal.

GEO. W. PENNINGTON,

A. BRUNING,

Sureties.

United States of America,

Territory of Alaska,—ss.

Geo. W. Pennington and A. Bruning, whose names are subscribed to the above and foregoing undertaking as sureties, being first duly sworn, each for himself doth depose and say: That he is a resident of the Territory of Alaska; that he is not an attorney or counsellor at law, marshal, clerk of any court, or other officer of any court; that he is worth the sum of Five Hundred (\$500.00) dollars over and above all his just debts and liabilities exclusive of property exempt from execution.

GEO. W. PENNINGTON.

A. BRUNING.

Subscribed and sworn to before me this 20th day of February, 1915.

[Seal]

JOHN F. DILLON,

Commissioner and Ex-officio Justice of the Peace,
Fairbanks Precinct.

The sufficiency of the sureties on the foregoing bond approved this 20 day of February, A. D. 1915.

CHARLES E. BUNNELL,

District Judge.

[Endorsed]: No. 1756. In the District Court of the United States for the Territory of Alaska, F. G.

Noyes, Receiver, etc., Plaintiff, vs. J. A. Jesson et al., Defendants. Bond on Appeal. Filed February 20, 1915. Angus McBride, Clerk. By P. R. Wagner, Deputy. [190]

**[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]**

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, Angus McBride, clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify, that the foregoing, consisting of one hundred and ninety (190) pages, numbered from 1 to 190 inclusive, constitutes a full, true and correct transcript of the record on cross-appeal in cause No. 1756, entitled: F. G. Noyes, Receiver of Washington-Alaska Bank, a corporation, organized under the laws of the State of Nevada, Plaintiff, vs. J. A. Jesson, D. H. Jonas, David Yarnell, Dan Ryan, John L. McGinn, R. C. Wood, C. J. Robinson, W. H. McMullen, C. E. Claypool, Robert Sheppard, Hans Stark, John Flygar, John P. Anderson, E. R. Peoples, James W. Hill, Ray Brumbaugh, J. A. Jackson, John Dusenbury, and L. N. Jesson, defendants, wherein F. G. Noyes, Receiver of Washington-Alaska Bank, a corporation, organized under the laws of the State of Nevada, is plaintiff and appellant, and J. A. Jesson, D. H. Jonas, David Yarnell, Dan Ryan, John L. McGinn, R. C. Wood, C. J. Robinson, W. H. McMullen, C. E. Claypool, Robert Sheppard, Hans Stark, John Flygar, John P. Anderson, E. R. Peoples, James W. Hill,

Ray Brumbaugh, J. A. Jackson, John Dusenbury and L. N. Jesson are defendants and appellees, and was made pursuant to and in accordance with the praecipe of the plaintiff and appellant filed in this action and made a part of this transcript, and by virtue of the citation issued in said cause, and is the return thereof in accordance therewith; and I further certify that the costs of preparing said transcript and this certificate, amounting to Eighty-five and 20/100 dollars (\$85.20) has been paid to me by counsel for plaintiff and appellant in said action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court, at Fairbanks, Alaska, this 23d day of February, 1915.

[Seal] ANGUS McBRIDE,
Clerk District Court, Territory of Alaska, Fourth
Division. [191]

[Endorsed]: No. 2593. United States Circuit Court of Appeals for the Ninth Circuit. E. G. Noyes, as Receiver of Washington-Alaska Bank, a Corporation, Appellant, vs. R. C. Wood, John L. McGinn, Ray Brumbaugh, J. A. Jesson, James W. Hill, E. R. Peoples, J. A. Healey, John A. Clark and George Preston, Appellees. Transcript of Record.

Upon Appeal from the United States District Court
for the Territory of Alaska, Fourth Division.

Received March 18, 1915.

F. D. MONCKTON,

Clerk.

Filed April 1, 1915.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Title of Court and Cause.]

Citation [on Appeal (Original)].

United States of America,
Territory of Alaska,—ss.

The President of the United States of America, to
R. C. Wood, John L. McGinn, Ray Brumbaugh,
J. A. Jesson, James W. Hill, E. R. Peoples, J.
A. Healey, John A. Clark and George Preston,
and Each of You, Greeting:

You, and each of you, are hereby cited and admon-
ished to appear and be at the United States Circuit
Court of Appeals for the Ninth Circuit at San Fran-
cisco, California, within thirty days from the date
hereof, pursuant to an order allowing an appeal made
and entered in the above-entitled cause, in which F.
G. Noyes, Receiver of the Washington-Alaska Bank,
a corporation, is plaintiff, and J. A. Jesson, D. H.
Jonas, David Yarnell, Dan Ryan, John L. McGinn,
R. C. Wood, C. J. Robinson, W. H. McMullen, C. E.

Claypool, Robert Sheppard, Hans Stark, John Flygar, John P. Anderson, E. R. Peoples, James W. Hill, Ray Brumbaugh, J. A. Jackson, John A. Clark, J. A. Healey, George Preston, B. R. Dusenberry and L. N. Jesson, are defendants, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 28 day of January, one thousand nine hundred and fifteen.

CHARLES E. BUNNELL,
District Judge for the District Court of Alaska,
Fourth Judicial Division.

[Seal] Attest: ANGUS McBRIDE,
Clerk.

Service of the foregoing citation and receipt of copy thereof, is hereby accepted and acknowledged this 29 day of January, A. D. 1915.

McGOWAN & CLARK,
Attys. for Defts., J. A. Jesson, Hill, Brumbaugh,
Clark and Preston.

JOHN L. McGINN and
A. R. HEILIG,
Attys. for Defendants, McGinn, Wood, Peoples and
Healey.

[Endorsed]: No. 1756. F. G. Noyes, Receiver, etc., Plaintiff, vs. J. A. Jesson et al., Defendants, Citation. Filder in the District Court, Territory of Alaska, 4th Div. Jan. 28, 1915. Augus McBride, Clerk. By —————, Deputy.

No. 2593. United States Circuit Court of Appeals for the Ninth Circuit. Citation on Appeal. Received Mar. 18, 1915. F. D. Monckton, Clerk. Filed Apr. 1, 1915, Frank D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

[Title of Court and Cause.]

[Order Extending Return Day to May 1, 1915.]

It having been stipulated and agreed by and between the parties hereto, through their respective attorneys, that the return day and the time for docketing the appeal in this action may be extended to and including the first day of May, 1915, on account of the great distant between Fairbanks, Alaska, and San Francisco, California, and the uncertainty of the mails,

NOW, THEREFORE, IT IS HEREBY ORDERED that the return day and the time for docketing said cause be extended to include the first day of May, 1915.

Dated at Fairbanks, Alaska, this 20th day of February, 1915.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 33.

[Endorsed]: No. 1756. In the District Court of the United States for the Territory of Alaska. F. G. Noyes, Receiver, etc., Plaintiff, vs. J. A. Jesson, et al., Defendants. Order Extending Return Day. Filed February 20, 1915. Angus McBride, Clerk. By P. R. Wagner, Deputy.

No. 2593. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to May 1, 1915, to File Record Thereof and to Docket Case. Filed Mar. 18, 1915. F. D. Monckton, Clerk. Refiled Apr. 1, 1915. F. D. Monckton, Clerk.

No. 2593.

In the
United States Circuit Court of Appeals
For the Ninth Circuit.

F. G. NOYES, as Receiver of WASHINGTON-ALASKA
BANK, a Corporation, - - - - - *Appellant,*

V E R S U S

R. C. WOOD, JOHN L. MCGINN, RAY BRUMBAUGH,
J. A. JESSON, JAMES W. HILL, E. R. PEOPLES,
J. A. HEALEY, JOHN A. CLARK and GEORGE
PRESTON, - - - - - *Appellees.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF ALASKA, FOURTH DIVISION.

B R I E F *of* A P P E L L A N T .

O. L. RIDER,
St. Louis, Mo.,
Attorney for Appellant.

Filed

MAY 1 - 1907

C. D. Mackinnon

In the
UNITED STATES CIRCUIT COURT OF APPEALS
For the Ninth Circuit.

No. 2593

**F. G. NOYES, as Receiver of WASHINGTON-ALASKA
BANK, a Corporation, - - - - - Appellant,**

V E R S U S

**R. C. WOOD, JOHN L. MCGINN, RAY BRUMBAUGH,
J. A. JESSON, JAMES W. HILL, E. R. PEOPLES,
J. A. HEALEY, JOHN A. CLARK and GEORGE
PRESTON, - - - - - Appellees.**

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF ALASKA, FOURTH DIVISION.

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ARGUMENT:	
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(a) Appellant is entitled to judgment against appellees, John A. Jesson, James W. Hill and E. R. Peoples, jointly and sever- ally for \$12,000 for the purchase by the bank of the stock of Strandberg Bros., Emma Strandberg and B. E. Johnson.	
(b) Appellant is entitled to judgment against appellees, John A. Jesson, Ray Brumbaugh, John A. Clark, J. A. Healey and George Preston, jointly and severally, for \$6,000 for the pur- chase of the John L. McGinn stock.	

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In the
UNITED STATES CIRCUIT COURT OF APPEALS
For the Ninth Circuit.

No. 2593

F. G. NOYES, as Receiver of WASHINGTON-ALASKA
BANK, a Corporation, - - - - - *Appellant,*

vs.

R. C. WOOD, JOHN L. MCGINN, RAY BRUMBAUGH,
J. A. JESSON, JAMES W. HILL, E. R. PEOPLES,
J. A. HEALEY, JOHN A. CLARK and GEORGE
PRESTON, - - - - - *Appellees.*

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE TERRITORY OF ALASKA,
FOURTH DIVISION.

BRIEF of APPELLANT.

Statement.

This is a suit brought by the Receiver of the
Washington-Alaska Bank of Nevada, a corporation
formerly doing business at Fairbanks, A l a s k a ,
against the officers and directors thereof to recover

for certain wrongful, fraudulent or illegal acts on their part by which the funds of said bank were wasted, dissipated or diverted.

The Washington-Alaska Bank of Nevada was originally incorporated under the name of Fairbanks Banking Company, a corporation organized in March, 1908, to succeed and take over the business of a partnership theretofore doing a banking business under the like name of Fairbanks Banking Company. This partnership was composed of E. T. Barnette, James W. Hill and R. C. Wood who, upon the organization of the corporation, transferred to it the assets of said partnership in exchange for capital stock and remained with it as officers thereof. At the time of the organization of the corporation above referred to, there were two other banks doing business in Fairbanks, namely: The First National Bank, and Washington-Alaska Bank of *Washington*. At one time during the period covered by this litigation, the corporation known as Fairbanks Banking Company owned the entire capital stock of the other two banks. About May 4, 1910, it sold the entire capital stock of said First National Bank to two of the defendants herein, John L. McGinn and R. C. Wood. Afterwards, on October 1, 1910, said Fairbanks Banking Company and said Washington - Alaska Bank of Washington combined, and thereafter said Washington-Alaska Bank of Washington ceased to exist or do business as a bank, and said Fairbanks Banking Company, by amendment to its articles of

incorporation, changed its name to Washington-Alaska Bank of *Nevada*, and continued to do business as a bank under that name until the appointment of the Receivers on January 6, 1911. Endeavor will be made to avoid as much as possible the confusion attendant upon this shifting of names.

The Board of Directors of the plaintiff bank did not consist of the same persons during the entire period of its existence, and only one of the defendants named in the petition upon whom service was had, namely, John A. Jesson, was such director during said entire period, and therefore charged with liability for each and all of the transactions complained of. The other officers and directors before the court are charged with liability for only those transactions alleged to have occurred during the terms of their respective office, and such officers are pointed out as each transaction complained of is hereinafter discussed. Generally speaking, it was sought to charge the respective officers and directors with liability for loss of the bank's funds (1) arising out of the taking over of the affairs of said partnership; (2) in purchasing shares of its own stock from certain of its stockholders; (3) for wrongfully declaring and paying a dividend; (4) for interest upon the amount of its funds invested in said capital stock of said First National Bank; (5) for purchasing the stock of the Washington-Alaska Bank of Washington at a gross overvaluation.

Trial was had to the court and Findings of Fact and Conclusions of Law were made and entered (Rec., pp. 171-199). Upon its Findings of Fact, and in accordance with said Conclusions of Law, the court entered a decree against the proper defendants for certain of said stock purchases and also on account of the declaring and paying of said dividend, and dismissed the action as to all other matters and things set up in the complaint (Rec., pp. 200-203). Appellant, plaintiff below, asked for certain Conclusions of Law granting him recovery upon the matters included in said dismissal (Rec., pp. 204-206), which were denied by the court (Rec., pp. 217) and such denial in each instance was excepted to on the ground that the same is "contrary to the facts found by the court and contrary to law." (Rec., pp. 218-220; Exs. 3-11.)

Appellant herein also saved exceptions to said Conclusions of Law and Decree based thereon in so far as they dismissed his cause of action on the ground that the same in each instance was "contrary to the facts found by the court and contrary to law." (Rec., pp. 220-221; Exs. 12, 13, 14.)

The appellees proposed to the court certain Findings of Fact, among which were those numbered 36 and 51 (Rec., pp. 206-209), which were adopted by the court as its Findings Nos. 45 and 49 (Rec., pp. 189-190-1.)

Appellant objected to each of said proposed Findings (Rec., p. 209) and also duly excepted to the granting of each and to the making of each a Finding by the court (Rec., pp. 217, 218; Exs. 1 and 2), said objection and exception as to each of said Findings as proposed and made being upon the ground that it is not supported by the evidence, is contrary to the evidence and is an incomplete statement or finding as to the matters therein involved as shown by the evidence. The substance of the whole of the testimony introduced and received on the trial respecting the matter covered by each of said Findings as proposed and made is preserved and incorporated in the Bill of Exceptions (Rec., pp. 209-217), and is hereinafter quoted in full at the place where said objections and exceptions are considered in this brief.

All of the foregoing objections and exceptions are presented in Assignments of Error Nos. 1 to 21 (Rec., pp. 227-234). The case is here to test the correctness of said Findings of Fact Nos. 45 and 49 and also to test the accuracy of the court's Conclusions of Law and the Decree upon the facts as found and proven, with the prayer that said Decree be corrected so as to grant appellant the relief prayed for in his petition and that this court shall render a proper decree on the record. Said Findings of Fact and Conclusions of Law are as follows (Rec., pp. 172-199):

“FINDINGS OF FACT AND CONCLUSIONS OF LAW.

I.

“ That the Washington-Alaska Bank, of which the plaintiff is receiver, was incorporated under the laws of the State of Nevada on the 21st day of January, 1908, with an authorized capital stock of \$300,000.00 divided into 3,000 shares of the par value of \$100.00 each; that said bank was incorporated under the name of the Fairbanks Banking Company; and that subsequently, by amendment to its Articles of Incorporation, said name was changed to Washington-Alaska Bank.

II.

“ That said bank commenced business in the town of Fairbanks, Alaska, on the 16th day of March, 1908, with a subscribed capital of \$206,000.00, part of which was paid for in cash, part in property, and the balance by the promissory notes of the subscribers.

III.

“ That prior to the 21st day of January, 1908, subscriptions for said capital stock were circulated, and the following persons among others, subscribed for shares thereof, to-wit. E. T. Barnette, 440 shares; R. C. Wood, 220 shares; James W. Hill, 220 shares; the name of R. C. Wood being subscribed thereto by said E. T. Barnette.

IV.

“ That prior to the incorporation of said bank, the said Barnette, Hill and Wood, as co-partners, were conducting a banking business in said town of Fairbanks under the firm name

and style of Fairbanks Banking Company, which said company in December, 1907, owing to financial difficulties, was unable to meet its obligations and was compelled to suspend business and close its doors, and was at the time of the organization of said corporation, in the hands of trustees.

V.

“ That said corporation was organized, among other things, for the purpose of taking over the business and affairs of said partnership and assuming its outstanding obligations.

VI.

“ That the capital of said partnership was \$200,000.00, which belonged to said Barnette, and the agreement existing between said partners was that the profits of said partnership were to be divided, one-half to said Barnette, and one-fourth each to said Hill and Wood.

VII.

“ That thereafter, and in the fore part of January, 1908, a large number of business, professional and mining men of the Fairbanks Recording District, Alaska, met in the town of Fairbanks, Alaska, for the purpose of organizing a corporation to purchase and take over and absorb the business of the Fairbanks Banking Company, a partnership, and at said meeting negotiations were begun by said proposed incorporators with said copartnership for the purchase of the same. That at said meeting a committee was appointed to go into the details of the reorganization of the Fairbanks Banking Company, and to report a basis upon which the business should be taken over, two of the mem-

bers of this committee having been members of the committee of depositors which had in December examined the assets.

VIII.

“ That said committee met on the 5th day of January, 1908, and, after investigating the affairs of the bank, made the following report to be presented for the consideration of the proposed new corporation:

“ (a) That the issued stock for the proposed new corporation be as of date February 15, 1908; that notes be taken for all deferred payments; that the same bear interest at the rate of one per cent per month from February 15, 1908, until paid; that twenty-five per centum of the unpaid for stock be due and payable on or before June 1st, 1908, and that the balance be due and payable on or before July 1st, 1908.

“ (b) That Captain E. T. Barnette and James W. Hill, with such associates as they may require, prepare a subscription list.

“ (c) That the amounts subscribed by any person be left to that person, and in case of over-subscription should be reduced proportionately.

“ (d) That the notes, properties and securities of the Fairbanks Banking Company, the old institution, examined by its present acting board of trustees and on which a valuation of \$288,000.00 in excess of its liabilities was placed, be accepted.

“ (e) That all notes, properties and securities which said board of trustees placed in the No. 3, or doubtful class remain the property of the old institution.

“ (f) That all interest on existing loans as of December 19, 1907, be computed to February 15, 1908, and that the amount of such accrued interest be placed to the credit of the old institution on the books of the new corporation, and that the same be payable on or before December 31, 1908.

“ (g) That should James W. Hill and R. C. Wood not take the full forty-four thousand dollars in stock in the new corporation, the balance of the amount not so taken to be paid to them not later than July 1st, 1908.

“ (h) That the proposition of Captain E. T. Barnette to leave on deposit with the new corporation the sum of two hundred thousand dollars, without interest for one year, be accepted, and that it be the understanding that such deposit will secure said new corporation against any adverse decision of the Court in the *Caus-tens v. Barnette* suit in so far as such decision may decrease the value of the Gold Bar Lumber Company property as accepted by the present board of trustees.

“ (i) That the officers of the new corporation be a president, vice-president, second vice-president, cashier, assistant cashier, treasurer, and secretary.

“ (j) That the number of the Board of Directors be twelve, f o u r to be elected for six months, four for twelve months, and four for eighteen months or until their respective successors are duly elected and qualified.

“ (k) That dividends be declared semi-annually on June 30, and December 31.

IX.

“ That said report was, on January 6th, 1908, submitted to said proposed incorporators, and at said meeting the said report was read, and passed on section by section as read, and on motion duly made and carried was adopted and ordered kept as a part of the records of said meeting.

X.

“ That at said meeting a subscription list, a copy of which is set forth in paragraph 3 of the amended complaint in this cause, was presented and signed by said proposed incorporators, setting forth the amount for which each respectively subscribed.

XI.

“ That at said meeting it was also agreed on behalf of the Fairbanks Banking Company, a copartnership, that said partnership would turn over to said corporation the property of said Fairbanks Banking Company, a partnership, on the terms specified in said report, and said proposed incorporators in behalf of said proposed corporation, in consideration thereof, agreed to assume the liabilities of said partnership.

XII.

“ That said Fairbanks Banking Company, a corporation, became such on the 21st day of January, 1908. That on the 8th day of February, 1908, a meeting of the subscribers of the capital stock of the Fairbanks Banking Company was held for the purpose, among others, of obtaining notes of the subscribers for the stock subscribed by them, and, at said meeting, said stock notes were subscribed by said subscribers of stock and delivered to said corporation.

“ That at the time of said meeting the Articles of Incorporation of said Fairbanks Banking Company had not been received from the State of Nevada, and for the purpose of expediency it was deemed advisable to elect a Board of Directors, and twelve directors were elected at said meeting, and it was agreed that said Board of Directors should act as such until the arrival of the Articles of Incorporation, when a formal meeting would be held and proper by-laws be adopted.

XIII.

“ That said Articles of Incorporation did not arrive in Fairbanks until some time in the month of March, 1908, and immediately thereafter a meeting of the stockholders of the Fairbanks Banking Company, a corporation, was called, and at said meeting said stockholders, among other things, adopted by-laws and elected a Board of Directors; and also passed a resolution to the effect that the matter of taking over the property of the Fairbanks Banking Company, a partnership, be left to the Board of Directors.

“ That on the 12th day of March, 1908, at said meeting of the subscribers to said capital stock, said subscriptions were accepted by them and the above-named Barnette, Hill and Wood, together with the other subscribers, were declared to be stockholders of the said corporation. The defendant Wood was not present at said meeting, but he was notified of the result of the same by the defendant Hill.

XIV.

“ Subsequently, at a meeting of the stockholders of said corporation, it was resolved that

the matter of taking over the business and affairs of said partnership be left to the Board of Directors. Thereafter, on March 12, 1908, at a meeting of the Board of Directors, said matter was considered by them and the resolutions of the proposed stockholders, set out in Finding VIII hereof, were by said directors adopted and approved, except that the resolution providing for the payment of accrued interest up to February 15, 1908, was by them amended so as to read 'March 15, 1908.' At the same meeting it was ordered by said Board of Directors that stock issue to said Barnette, Hill and Wood in exchange for the property received from them by said corporation, as follows: Barnette, 440 shares; Hill, 220 shares; Wood, 220 shares.

XV.

“ That on the 16th day of March, 1908, a written agreement was entered into between said corporation and said partners, and on the same day the same was signed by the said Barnette and Hill, and also on behalf of said bank by its president and secretary, wherein the valuation of the resources of said partnership was fixed at \$790,940.31 and its liabilities at \$538,940.31, leaving an excess of \$252,000.00 belonging to the said Barnette, Hill and Wood, in which said agreement the said Barnette, Hill and Wood agreed to accept stock of the corporation at its par value for the amount of assets in excess of said liabilities, except that \$200,000.00 thereof should be placed to the credit of the said Barnette as a special deposit with said corporation upon the terms therein stated. By the terms of said agreement the amount of stock to be issued to Barnette, Hill and Wood was fixed at \$52,000.00 instead of \$88,000.00 as contemplated by

said resolution and subscription, thus entitling Barnette to 260 shares and Wood and Hill each to 130 shares. A copy of said agreement is annexed to plaintiff's complaint and marked 'Exhibit One.'

XVI.

" That at the time said agreement was entered into, the said Barnette was president of the said corporation and also a member of the Board of Directors; the said Hill was a member of its executive committee and also its vice-president, and the said Wood was its cashier, and the said defendant John A. Jesson was a member of its Board of Directors. That the above-named Wood, Hill and Jesson are all of the officers of the said bank at the time said agreement was entered into upon whom service has been made in this case, and who are now before the court as defendants.

XVII.

" That the matter of preparing the papers for the transfer of said property belonging to said partnership to said corporation was, by the Board of Directors, left to the executive committee, and the said executive committee examined the affairs of said partnership, and, under their direction, said written agreement was prepared and afterward submitted to the Board of Directors for approval, and by them approved.

XVIII.

" That according to the by-laws of said corporation, the said executive committee had the same powers as the Board of Directors, subject to the approval of their acts by said Board of Directors.

XIX.

“ That at the time said written agreement was signed and executed, and during all of the negotiations leading up to the making of the same, the defendant Wood was in Seattle, Washington, but he was advised fully concerning the same by the defendant Hill by letter and by telegram.

XX.

“ That prior to the return of said Wood to Fairbanks, to-wit, on the 29th day of February, 1908, he offered to sell his stock in said corporation and to take in payment therefor part cash and a note for the balance, to be secured by said stock as collateral security.

XXI.

“ That the defendant Wood returned to Fairbanks, some time in the month of April, 1908, and, upon his return, he signed said written agreement so entered into as aforesaid, knowing that the same contained said clause requiring him to take stock for his share of the assets of said partnership so transferred to said corporation in excess of the liabilities thereof as aforesaid, and also knowing that the same did not provide for the payment of said accrued interest.

XXII.

“ That of the loans and discounts transferred by said partnership to said corporation, a large amount were then past due, of which then past due paper the sum of \$69,908.94 now remains in the hands of the receiver unpaid and uncollectible, which said loans and discounts were accepted by the directors of said corporation at

their face value, and the same were included in those on which the accrued interest referred to in said resolution, was afterward computed.

XXIII.

“ That of said notes so past due as aforesaid, there were two executed by the Tanana Electric Company in the sum of \$27,997.38, which depended for their value upon the existence of an alleged guaranty of the Scandinavian-American Bank to make advancements sufficient to cover the same; that said alleged guaranty never had any existence in fact, and the claim therefor had been repudiated by said Scandinavian-American Bank prior to the time said note was accepted by said Board of Directors, and said repudiation was known to the members of said board. That said notes are still unpaid, and the same were at all times carried on the books of the said Washington - Alaska Bank, formerly Fairbanks Banking Company, as an asset in the sum of \$27,997.38.

XXIV.

“ That said Board of Directors and the officers of said bank accepted said notes of the Tanana Electric Company and paid therefor the sum of \$27,997.38, with knowledge on the part of each of them that the same depended for their value upon said alleged guaranty alone.

XXV.

“ That among the other assets of said partnership so accepted by said officers and directors was four-fifths of the capital stock of the Gold Bar Lumber Company, a corporation existing in the State of Washington, which said stock was accepted and paid for at the valuation of

\$341,949.00, and said stock was at all times during the existence of said corporation carried as an asset in said sum.

XXVI.

“ That at the first meeting of the Board of Directors, held on the 12th day of March, 1908, the defendant Wood was elected cashier of said bank, at which time he was then in the City of Seattle, Washington, as aforesaid. Immediate notice was given to him of said election.

XXVII.

“ That the said Wood accepted said office of cashier while in the said City of Seattle, and, on the 16th day of March, 1908, entered upon the discharge of his duties as such cashier, and, upon his return to said Fairbanks in April, 1908, as aforesaid, entered actively upon such duties and continued to so act until June 29, 1908, when he tendered his resignation as such cashier, and the same was accepted by the Board of Directors to be effective at the close of business on June 30, 1908, and one B. R. Dusenbury, who was then assistant cashier, was elected to succeed Wood as cashier.

XXVIII.

“ That at the time said Wood tendered his resignation as cashier as aforesaid, he demanded that there be paid to him the amount of his interest in said partnership assets, to-wit, \$13,000.00.

XXIX.

“ That a certificate for 130 shares of the capital stock of said corporation had been written up in the name of the defendant Wood, of the

par value of \$13,000.00, but the same was never detached from the stock book. That said 130 shares were carried on the books of said bank as outstanding stock from March 16, 1908, to June 30, 1908.

XXX.

“ That on the 30th day of June, 1908, with the knowledge, consent and approval of the officers and directors of said bank, a certificate of deposit was issued to and accepted by the said Wood in the sum of \$13,000.00, in lieu of said stock, which said certificate was signed by the said B. R. Dusenbury as assistant cashier prior to the time when the said resignation of the said Wood as cashier became effective, and said shares of capital stock were on the same day charged to treasury stock on the books of said bank.

XXXI.

“ That subsequently the said Wood drew out in cash from the funds of said bank the amount of the said certificate of deposit, to-wit, \$13,000.00.

XXXII.

“ That at the time the said certificate of deposit was issued to said Wood there was in effect a resolution of the said board of directors requiring monthly statements, showing the condition of said bank, to be presented to said Board of Directors and that in accordance with said resolution, there was, during the existence of said bank, presented to said Board of Directors at each monthly meeting thereafter a statement showing the condition of said bank, and said statements were examined in detail by said board and by them ordered filed.

XXXIII.

“ That there was submitted to said Board of Directors at its meeting on July 13, 1908, a written report in detail showing the condition of the affairs of said bank, which said report was examined in detail and was ordered filed, and, under the question of this report, the question of refunding to those desirous of giving up their stock in the Fairbanks Banking Company was discussed, and it was the sense of the meeting that any stockholder desirous of giving up the stock, be paid for the same, and the stock returned to the treasury of said bank.

XXXIV.

“ That at the time the said certificate of deposit was issued to said Wood, and his shares of stock so charged to treasury stock as aforesaid, the following of the defendants now before the court in this action were among its officers, to-wit, James W. Hill, a member of the executive committee and its vice-president, John A. Jesson, a member of the Board of Directors, R. C. Wood, cashier and a member of its executive committee; and, at said meeting of July 13, 1908, at the time said report was submitted and the sense of said meeting was expressed as aforesaid, the said John A. Jesson was present and participated therein as a member of the Board of Directors, and the said James W. Hill was also present as its vice-president and a member of the executive committee.

XXXV.

“ That of the notes accepted from said partnership, as aforesaid, and paid for by said corporation, there were charged on December 31,

1907, by said partnership on the books of said partnership to an account known as 'doubtful account' the sum of \$22,979.99, and said doubtful account, so including said notes in said amount, was then depreciated on the said books to the amount of thirty-three and one-third per cent thereof, which said notes were accepted by said corporation and paid for by them in the amount aforesaid, to-wit, \$22,979.99, all of which said notes were then past due, and of which there still remains unpaid and uncollectible the sum of \$12,860.61. That of said notes so charged to said doubtful account as aforesaid, there was on December 31, 1909, charged by said corporation to the account of profit and loss on the books of said corporation the sum of \$12,-192.80.

XXXVI.

“ That on March 23, 1908, pursuant to said resolution of the said Board of Directors adopted on March 12, 1908, the accrued interest on said loans so transferred to said corporation was computed to March 15, 1908, in the sum of \$39,642.81, and one-half thereof was placed to the credit of said Barnette, and one-fourth thereof each to the credit of said Hill and Wood on the books of said corporation, and subsequently the same was paid to said Barnette, Hill and Wood in cash.

XXXVII.

“ That of said interest so paid to said Barnette, Hill and Wood as aforesaid, approximately \$7,500.00 thereof was never collected by said bank.

XXXVIII.

“ That at the time said resolution allowing said interest was adopted, and at the time the amount thereof as aforesaid was placed to the credit of said Barnette, Hill and Wood as aforesaid, on the books of the said bank, the following defendants now before the court in this action were officers of said bank, to-wit, John A. Jesson, member of the board of directors, James W. Hill, member of the executive committee and vice-president, and R. C. Wood, cashier.

XXXIX.

“ That at the time said corporation commenced business on March 16, 1908, it had a total subscribed and outstanding capital stock in the sum of \$206,000.00, only a small portion of which was paid for in cash, and at no time did the same exceed said amount; and that of its funds \$341,949.00 was at all times invested in stock of the Gold Bar Lumber Company, being \$135,949, in excess of its subscribed and outstanding stock.

XL.

“ That at the time said investment was so made as aforesaid, said Lumber Company was closed down, and immediately prior to closing down, it has been operated at a loss, that in so far as said Lumber Company was able to operate since the purchase of said stock by said corporation, all of its earnings and a part of its surplus have been expended in the purchase and repair of equipment for said mill, and in the operation of said mill its standing timber was being consumed and its best asset exhausted. That no dividends have ever been paid on the capital

stock of said lumber company during the time the same was owned by said bank.

XLI.

“ That the Articles of Incorporation of said corporation authorized and empowered said corporation among other things,

‘To buy and sell gold and silver bullion, foreign coin, stocks, bonds, and all other property, real and personal, and to do any business and exercise any powers incident to the banking business, or necessary or proper to the furtherance and attainment of the purposes of said bank.’

XLII.

“ That subdivisions 5 and 6 of Articles XII of the by-laws of said corporation, adopted at the stockholders’ meeting held March 12, 1908, provided that all issued and outstanding stock of the company that may be donated to, or purchased by the company, or which shall revert by reason of failure to pay for the same, shall be treasury stock, and shall be held subject to the disposal of the action of the Board of Directors. Said stock shall neither vote nor participate in dividends while held by the company. The Board of Directors shall be given the first option to purchase for the corporation the stock of any stockholder, and shall be entitled to purchase the same provided said Board of Directors shall offer to pay to said stockholder the same amount as he might obtain from any other person.

XLIII.

“ That on the 14th day of September, 1908, the executive committee of the said Fairbanks

Banking Company, consisting of Barnette, president, Hill, vice-president, Dusenbury, cashier, and directors Jonas, John Jesson and Ryan, passed a resolution to the effect that said corporation would not take over any more stock of the stockholders, which said resolution of the executive committee was approved and ratified by the board of directors on October 14, 1908, the directors present at said meeting being: Hill, Peoples, Yarnell, Robinson, Ryan, Jonas and Jesson, and also the said Dusenbury was present.

XLIV.

“ That after said bank took said stock of said Wood into its treasury, frequent and continuous surrenders of its stock were made by its stockholders, amounting in all to thirty-eight different and distinct transactions, aggregating a total of \$43,000, exclusive of said Wood's stock. That the stock so taken back by the corporation was charged to the treasury stock account, and of the same only ten shares of the par value of \$1000 were ever re-issued. That said stock surrenders continued down to and including October 25, 1910, when the last surrender was made, being the McGinn stock of the par value of \$10,000, for which the sum of \$6000 in cash was paid by the bank to said McGinn.

XLV.

“ That upon the 18th day of November, 1908, Strandberg Brothers were the owners of 100 shares of the outstanding capital stock of said Fairbanks Banking Company, Emma Strandberg was the owner of 10 shares, and B. E. Johnson was the owner of 10 shares.

“ That said stock was taken in part payment

of a loan that the bank had theretofore made to said Strandberg Brothers and said Johnson, who were mining copartners, and the bank also received at said time the further sum of \$4,000 in cash, which fully paid said loan. That said transaction amounted to the taking of stock for a pre-existing debt, rather than the purchase of stock by the Board of Directors. That said directors believed at said time said loan was precarious, and said directors, in taking said stock in partial satisfaction of said loan, did so in good faith and believing it to be for the best interests of the corporation.

XLVI.

“ That on the 3d day of February, 1909, at a meeting of the executive committee of said bank, it was again resolved that the officers of said bank be directed to say that ‘the corporation did not desire to buy in its stock at present,’ which said resolution of the said executive committee was thereafter and on, to-wit, the 13th day of February, 1909, approved and ratified by the said board of directors.

XLVII.

“ That on the 15th day of March, 1909, H. B. Parkin, who was the owner of 10 shares of the outstanding capital stock of said bank, and Oscar Tackstrom, who was the owner of 5 shares of the said outstanding capital stock, requested the executive committee of said bank to buy their stock.

“ That said executive committee thereupon again announced its policy, by resolving, ‘It was the sense of the meeting that the bank observe the rule established at a previous meeting of the

board wherein it was declared not to buy in any more stock,' which said resolution was approved and ratified by the board of directors at said meeting held April 12, 1909, at which meeting of the directors the following officers and directors were present: Barnette, Claypool, Hill, Jesson, Robinson, Yarnell, Brumbaugh, Peoples and Dusenbury.

XLVIII.

“ That John L. McGinn was a stockholder of the Washington-Alaska Bank, formerly the Fairbanks Banking Company, and was the owner of 100 shares of the outstanding capital stock of said Washington-Alaska Bank, of the par value of \$10,000.

XLIX.

“ That a short time prior to the 13th day of October, 1910, John L. McGinn, as a stockholder of the Washington-Alaska Bank, formerly the Fairbanks Banking Company, demanded the right to inspect its books and papers, and threatened that, unless this right was granted him immediately, to make application for an order permitting him to do so and for the appointment of a receiver of the said Washington-Alaska Bank. That the directors of the Washington - Alaska Bank, fearing that information obtained by such an investigation would be used by said McGinn in promoting the interests of the First National Bank in its business, and that if such information was refused and any litigation was started it would impair public confidence in the Washington-Alaska Bank and perhaps start a run of its customers and depositors on said bank, acting under this belief, authorized the cashier to

loan a purchaser sufficient funds to pay for the stock of said McGinn; one of the directors stating at said time that he had a purchaser who would be willing to purchase said stock for the sum of \$6000, but it would be necessary for him to borrow money to complete said purchase; that, as the matter was urgent and the purchaser was not immediately available, the cashier purchased the stock in his own name and gave his note to the bank for the amount thereof and paid to said John L. McGinn the sum of \$6,000.00 for his 100 shares of capital stock. That thereafter, and on or about the 25th day of October, 1910, said cashier, without the knowledge of any of the directors, cancelled his note and charged the amount thereof to the bank, and surrendered the stock to the bank, and the stock was thereafter held, with other treasury stock of the company.

L.

“ That upon said 13th day of October, 1910, the director George Preston, by reason of sickness of his family, was quarantined and unable to attend the meeting of the Board of Directors held on said day, and was not present thereat, and knew nothing of the action taken at the meeting of said board.

LI.

“ That when stock was so taken back by the corporation, the amount paid therefor was either paid in cash, or notes held by the bank were cancelled and surrendered to the stockholders.

“ That said bank had no surplus or undivided profits against which the same could be charged.

LII.

“ That the taking back of said stock and the payment therefor as aforesaid was illegal, wrongful, and in violation of the laws of the State of Nevada under which said corporation was organized.

LIII.

“ That after the surrender of the stock of the said Wood, to-wit, from July 13, 1908, to and including September 12, 1908, stock was so taken up in the sum of \$13,400.00, during which time the defendant John A. Jesson was a member of the board of directors, and the defendant James W. Hill, a member of its said executive committee.

“ That from September 13, 1908, to and including October 13, 1908, stock was so taken up in the sum of \$1500.00 during which time the defendants John A. Jesson and James W. Hill were membebrs of the Board of Directors;

“ That from October 14, 1908, to and including March 13, 1909, stock was so taken up in the sum of \$13,100.00, during which time the defendants Jesson, Hill and Peoples were members of the Board of Directors;

“ That from the 14 of March, 1909, to and including September 12, 1909, stock was so taken up in the sum of \$1000.00, during which time the defendants John A. Jesson, Hill and Brumbaugh were members of the Board of Directors;

“ That from September 13, 1909, to and including October 12, 1909, stock was so taken up in the sum of \$3000.00, during which time the defendants John A. Jesson, Hill and Brumbaugh and McGinn were members of the Board of Directors.

“ That from October 13, 1909, to and including January 18, 1910, stock was so taken up in the sum of \$1000.00, during which time the defendants John A. Jesson, Hill, M c G i n n and Brumbaugh and W o o d were members of the Board of Directors;

“ That from January 19, 1910, to and including October 25, 1910, stock was so taken up in the sum of \$10,000, for which the said sum of \$6,000.00 was paid in cash, and at the time said stock was so taken up the defendants John A. Jesson, Brumbaugh, Clark, Healey and Preston were members of its Board of Directors.

LIV.

“ That said stock surrenders so m a d e as aforesaid were acquiesced in by said directors, and in some instances were made under their directions and with their express approval.

LV.

“ That in the month of May, 1909, said Fairbanks Banking Company and the Washington-Alaska Bank of Washington, then doing business at Fairbanks, each purchased one-half of the capital stock of the First National Bank of Fairbanks, Alaska, for which each paid the sum of \$62,500.00 and continued to own and hold said stock until the month of May, 1910.

“ That on or about the 4th of May, 1910, said Fairbanks Banking Company s o l d the entire capital stock of the said First National Bank to the defendants Wood and McGinn for the sum of \$125,000.00 and received said amount in payment therefor, delivering to them the said capital stock of said First National Bank.

“ That at the time said banks purchased said stock of the First National Bank, they gave to said Wood an option to purchase the same on or before June 1, 1910, for the sum of \$125,000.00, and said sale to said Wood and McGinn was made in pursuance to said option.

“ That neither the said Fairbanks Banking Company, nor the said Washington - Alaska Bank of Washington, received any dividend on said stock of the said First National Bank during the time the same was held and owned by them, nor did they, or either of them, receive any interest from the said Wood and McGinn, or from anyone in their behalf, for the money invested in said stock during the time the same was so invested.

LVI.

“ That on September 14, 1909, the said Fairbanks Banking Company purchased the entire capital stock of the said Washington - Alaska Bank of Washington, paying therefor the sum of \$250,000.00, which said capital stock at said time was of the par value of \$150,000.

LVII.

“ That at the time the said capital stock of said Washington-Alaska Bank of Washington was so purchased, the defendants J. A. Jesson, James W. Hill and John L. McGinn were members of the Board of Directors of the Fairbanks Banking Company, and said purchase of said capital stock was ratified and confirmed by them as members of said board on the said 14 day of September, 1909.

“ That at the time the aforesaid resolution was adopted by the said board of directors to

take over the business and affairs of said partnership; and at the time said written agreement between said corporation and said partners was entered into and confirmed and approved; and at the time said valuation was placed on said capital stock of the said Gold Bar Lumber Company and said stock accepted at such valuation; and at the time said past due notes held by said partners were accepted and paid for by said corporation, including said notes of the said Tanana Electric Company and said notes which had been charged to the doubtful account of said partnership as aforesaid; and at the time said accrued interest on said notes so purchased of said partnership was computed and allowed to said partners and placed to their credit as aforesaid on the books of said corporation, the following defendants now before the court in this action were officers and directors of said corporation and acquiesced in said transactions and gave their consent thereto with full knowledge on the part of each of them of the existence of the facts heretofore found respecting said transactions, to-wit, James W. Hill, vice-president and member of its executive committee, John A. Jesson, member of its board of directors, R. C. Wood, its cashier. That the said Hill and Wood were also members of the partnership with which said corporation contracted respecting said matters and were each personally interested therein adversely to said corporation.

LIX.

“ That at the time of the said sale of the said capital stock of the said First National Bank to the said Wood and McGinn, the following defendants now before this court were officers and directors of the said Fairbanks Banking Com-

pany, and each consented to said sale on the terms thereof heretofore stated, to-wit, J. A. Jesson, R. C. Wood, John L. McGinn and Ray Brumbaugh.

LX.

“ That on the 12 day of April, 1910, the said Fairbanks Banking Company, by its Board of Directors, declared a dividend of twenty per cent on its then outstanding capital stock of \$168,600.00, which dividend amounted to \$33,720.00, and which said sum was paid to the stockholders of said bank either in cash or by crediting the amount thereof upon notes owing by said stockholders to said bank.

LXI.

“ That at the time said dividend was so declared and paid, the said Fairbanks Banking Company did not have any surplus or undivided profits out of which the same could be declared and paid.

LXII.

“ That said dividend was declared and paid in violation of the laws of the State of Nevada, and also in violation of the by-laws of the said Fairbanks Banking Company, and was wrongful and illegal.

LXIII.

“ . That at the time said dividend was declared and paid, the defendants Wood, McGinn, Brumbaugh and John A. Jesson were members of the board of directors of the said Fairbanks Banking Company, and gave their consent thereto.

LXIV.

“ That on the 1st day of October, 1910, the said Fairbanks Banking Company and the said Washington-Alaska Bank of Washington combined, at which time the said Fairbanks Banking Company took over the assets of the said Washington-Alaska Bank of Washington and assumed and agreed to pay its outstanding liabilities; and thereafter the said Washington-Alaska Bank of Washington ceased to exist or do business as a bank, and the Fairbanks Banking Company, by amendment to its Articles of Incorporation, changed its name to Washington-Alaska Bank of Nevada, and continued thereafter to transact business under said name at said Fairbanks, Alaska, until the appointment of the receiver therefor.

LXV.

“ That pursuant to the agreement heretofore referred to between the said Fairbanks Banking Company and the said partnership formerly existing between the said Barnette, Hill and Wood, the said sum of \$200,000.00 to be paid to the said Barnette was placed to his credit on the books of said corporation as a special deposit, and subsequently the entire sum thereof was paid to the said Barnette in cash and drawn out by him from the funds of said bank.

LXVI.

“ That the assets of the said bank now in the hands of the receiver are insufficient to pay its liabilities, and the amount of such liabilities is more than \$470,000.00 in excess of the value of said assets.

“ CONCLUSIONS OF LAW.

“ Upon the foregoing findings of fact, the court finds as conclusions of law:

“ 1. That the defendants Wood, McGinn, Brumbaugh and Jesson are jointly and severally liable in the sum of \$33,720.00, by reason of the declaration and payment of the dividend upon the capital stock of the Fairbanks Banking Company on April 12, 1910;

“ 2. That the defendant Jesson is liable in the sum of \$13,400.00 by reason of the surrender of shares of capital stock of said company, made between July 13, 1908, and September 12, 1908;

“ 3. That the defendants Jesson and Hill are jointly and severally liable in the sum of \$1,500.00, for surrender of shares of capital stock of said Company, made between September 13, 1908, and October 13, 1908;

“ 4. That the defendants Jesson, Hill and Peoples are jointly and severally liable in the sum of \$1100.00, for surrenders of shares of capital stock, made between October 14, 1908, and March 13, 1909;

“ 5. That the defendants Jesson, Hill and Brumbaugh are jointly and severally liable in the sum of \$1100.00, for surrenders of shares of capital stock of said Company, made between March 14, 1909, and September 12, 1909;

“ 6. That defendants Jesson, Brumbaugh and McGinn are jointly and severally liable in

the sum of \$3000.00, for surrenders of capital stock of said Company, made between September 13, 1909, and October 12, 1909;

“ 7. That defendants Jesson, McGinn and Brumbaugh are jointly and severally liable in the sum of \$1000.00, for surrenders of capital stock made between October 13, 1909, and January 18, 1910.

“ 8. That the plaintiff is entitled to a decree and judgment against the above-named defendants for the recovery of the sums above mentioned, and that as to the other defendants in this suit this action should be dismissed.

“ Dated June 11, 1914.

F. E. FULLER, *District Judge.*

“ Entered in Court Journal No. 12, page 944.”

Upon the foregoing Findings of Fact and in accordance with said Conclusions of Law, the court made and entered Decree herein, which is as follows (Rec., pp. 200-203) :

“ DECREE.

“ *Be It Remembered* that on the 22d day of April, A. D. 1914, the above-entitled cause came on regularly for trial before the court, without a jury, upon the issues as joined between the plaintiff and the defendants J. A. Jesson, R. C. Wood, J. A. Healey, E. R. Peoples, John L. McGinn, Ray Brumbaugh, James W. Hill, John A. Clark and George Preston. The Honorable F. E. Fuller, Judge of said court, presiding. The plaintiff appeared in person and by his attorney

O. L. Rider, and the said defendants R. C. Wood, James W. Hill, E. R. Peoples, and John L. McGinn, appearing by their attorneys A. R. Heilig and John L. McGinn, and the defendants J. A. Jesson, Ray Brumbaugh, J. A. Healey, John A. Clark, George Preston and E. R. Peoples appearing by their attorneys McGowan & Clark, and thereupon the respective parties, plaintiff and defendants, from day to day introduced their testimony in support of said issues until the 6th day of May, 1914, when all of said parties rested and the introduction of said testimony was closed, and thereupon the court, after hearing the arguments of counsel and after considering the pleadings and the testimony, and being fully advised in the premises, did, on the 11th day of June, 1914, make and file its findings of fact and conclusions of law upon said issues; and now, to-wit, on this 15th day of June, 1914, the court being fully advised in the premises, it is ordered, adjudged and decreed as follows, to-wit:

I.

“ That the plaintiff have and recover of and from the defendants R. C. Wood, John L. McGinn, Ray Brumbaugh and J. A. Jesson, jointly and severally, the sum of \$33,720 by reason of the declaration and payment on April 12th, 1910, of the dividend upon the capital stock of the Fairbanks Banking Company set up in the complaint.

II.

“ That the plaintiff have and recover of and from the defendant J. A. Jesson the further sum of \$13,400.00 by reason of the surrender of

shares of the capital stock of said company made between July 13, 1908, and September 12, 1908.

III.

“ That the plaintiff have and recover of and from the defendants J. A. Jesson and James W. Hill, jointly and severally, the further sum of \$1,500.00 by reason of the surrender of shares of the capital stock of said company made between September 13, 1908, and October 13, 1908.

IV.

“ That the plaintiff have and recover of and from the defendants J. A. Jesson, James W. Hill and E. R. Peoples, jointly and severally, the further sum of \$1,100.00 by reason of the surrender of shares of the capital stock of said company made between October 14, 1908, and March 13, 1909.

V.

“ That the plaintiff have and recover of and from the defendants, J. A. Jesson, James W. Hill and Ray Brumbaugh, jointly and severally, the further sum of \$1,000.00 by reason of the surrender of shares of the capital stock of said company made between March 14, 1909, and September 12, 1909.

VI.

“ That the plaintiff have and recover of and from the defendants J. A. Jesson, Ray Brumbaugh and John L. McGinn, jointly and severally, the further sum of \$3,000.00 by reason of the surrender of shares of the capital stock of said

company made between September 13, 1909, and October 12, 1909.

VII.

“ That the plaintiff have and recover of and from the defendants J. A. Jesson, John L. McGinn and Ray Brumbaugh, jointly and severally, the further sum of \$1,000.00 by reason of the surrender of shares of the capital stock of said company made between October 13, 1909, and January 18, 1910.

VIII.

“ That the plaintiff take nothing as against the defendants J. A. Healey, John A. Clark and George Preston by reason of any of the matters and things set forth in the complaint herein and that this action be and the same is hereby dismissed as to said J. A. Healey, John A. Clark and George Preston.

IX.

“ That the plaintiff take nothing, further than as above specified, against the defendants, R. C. Wood, E. R. Peoples, John L. McGinn, J. A. Jesson, Ray Brumbaugh and James W. Hill, by reason of any of the matters and things set forth in the complaint herein, and that this action be and the same is hereby dismissed as to them in respect to all matters and things set up in the complaint herein, except as to the declaration and payment of said dividend and the surrenders of the shares of the capital stock of said company as above specified;

“ All of which is now finally *ordered, adjudged and decreed* at the cost of the defendants R. C. Wood, E. R. Peoples, John L. McGinn, J. A. Jesson, Ray Brumbaugh and James W. Hill.

“ Let execution issue for the enforcement of above judgment and decree against the defendants R. C. Wood, E. R. Peoples, John L. McGinn, J. A. Jesson, Ray Brumbaugh and James W. Hill.

“ Dated Fairbanks, Alaska, this 15th day of June, 1914.

F. E. FULLER,

Judge of the District Court, Territory of Alaska, Fourth Division.

“ Entered in Court Journal No. 12, page 958.”

SPECIFICATIONS of ERROR.

I.

The court erred in granting defendants' proposed Finding of Fact No. XXXVI, and in adopting the same over plaintiff's objection as Finding of Fact XLV by the court.

II.

The court erred in granting defendants' proposed Finding of Fact No. LI and in adopting the same over plaintiff's objection as Finding of Fact No. XLIX by the court.

III.

The court erred in denying plaintiff's proposed Conclusion of Law No. 1, which is as follows:

"The defendants John A. Jesson, James W. Hill, and R. C. Wood are jointly and severally liable for the following items:

Purchase of Tanana Electric Company notes.....	\$27997.38
Purchase of other past due notes from the partnership which are still unpaid.....	41911.56
Accrued interest on partnership notes paid to Barnette, Hill and Wood and which was not collected.....	7500
Balance of accrued interest paid to Barnette, Hill and Wood partnership notes purchased.....	32142.81
Surrender of Wood's stock.....	13000.00"

IV.

The court erred in denying that portion of plaintiff's proposed Conclusion of Law No. 1, which is as follows:

“Purchase of Tanana Electric Company notes. \$27997.38”

V.

The court erred in denying that portion of plaintiff's proposed Conclusion of Law No. 1, which is as follows:

“Purchase of other notes past due from the partnership. \$41911.56”

VI.

The court erred in denying that portion of plaintiff's proposed Conclusion of Law No. 1, which is as follows:

“Accrued interest on partnership notes paid to Barnette, Hill and Wood and which was not collected. \$ 7500.”

VII.

The court erred in denying that portion of plaintiff's proposed Conclusion of Law No. 1, which is as follows:

“Balance of accrued interest paid to Barnette, Hill and Wood on partnership notes purchased. . \$32142.81”

VIII.

The court erred in denying that portion of plain-

tiff's proposed Conclusion of Law No. 1, which is as follows:

“Surrender of Wood's stock.....\$13000.”

IX.

The court erred in denying plaintiff's proposed Conclusion of Law No. 6 in so far as the same relates to the surrender of \$12,000 worth of stock, being the stock of Strandberg Brothers, \$10,000; E m m a Strandberg, \$1,000; B. E. Johnson, \$1,000, which said conclusion of law is as follows:

“ The defendants John A. Jesson, James W. Hill and E. R. Peoples are jointly and severally liable for surrenders of stock made between October 14, 1908, and March 13, 1909, in the sum of \$13,100.00.”

X.

The court erred in denying plaintiff's proposed Conclusion of Law No. 10, which is as follows:

“ The defendants John A. Jesson, Ray Brumbaugh, John A. Clark, J. A. Healey, and George Preston are jointly and severally liable for surrenders of stock m a d e between January 19, 1910, and October 25, 1910, in the sum of \$6,000.00.”

XI.

The court erred in denying plaintiff's proposed Conclusion of Law No. 11, which is as follows:

“ The defendants J. A. Jesson, R. C. Wood, John L. McGinn and Ray Brumbaugh are jointly and severally liable for one year's interest

upon the amount invested in the stock of the First National Bank and sold to McGinn and Wood \$10,000.00."

XII.

The court erred in making that portion of Conclusion of Law No. 8 by the court, which is as follows:

"and that as to the other defendants in this suit this action should be dismissed."

XIII.

The court erred in making and entering paragraph 8 of the decree herein, which is as follows:

"That the plaintiff take nothing as against the defendants J. A. Healey, John A. Clark and George Preston by reason of any of the matters and things set forth in the complaint herein and that this action be and the same is hereby dismissed as to said J. A. Healey and John A. Clark and George Preston."

XIV.

The court erred in making and entering paragraph 9 of the decree herein, which is as follows:

"That the plaintiff take nothing, further than as above specified, against the defendants R. C. Wood, E. R. Peoples, John L. McGinn, J. A. Jesson, Ray Brumbaugh and James W. Hill, by reason of any of the matters and things set forth in the complaint herein, and that this action be and the same is hereby dismissed as to them in respect to all matters and things set up in the complaint herein, except as to the declaration and payment of said dividend and the surrender of the shares of the capital stock of said company as above specified."

XV.

The court erred in refusing to enter judgment and decree in favor of plaintiff and against the defendants, J. A. Jesson, James W. Hill and E. R. Peoples, on account of the surrender of \$12,000.00 worth of stock between October 14, 1908, and March 13, 1909, being the stock of Strandberg Brothers, \$10,000.00, Emma Strandberg, \$1,000.00, B. E. Johnson, \$1,000.00, and in dismissing plaintiff's action therefor.

XVI.

The court erred in refusing to enter judgment and decree in favor of the plaintiff and against the defendants, J. A. Jesson, Ray Brumbaugh, John A. Clark, J. A. Healey and George Preston in the sum of \$6,000.00 for surrenders of stock made between January 19, 1910, and October 25, 1910, and in dismissing plaintiff's action therefor.

XVII.

The court erred in refusing to make and enter decree and judgment against the defendants J. A. Jesson, James W. Hill and R. C. Wood in the sum of \$27,997.38, on account of the purchase of the Tanana Electric Company notes.

XVIII.

The court erred in refusing to make and enter judgment and decree in favor of the plaintiff and against the defendants, J. A. Jesson, James W. Hill and R. C. Wood in the sum of \$41,911.56 on account of the purchase from the partnership of notes other

than said Tanana Electric Company notes, which were past due at the time of purchase and are still unpaid.

XIX.

The court erred in refusing to make and enter judgment in favor of the plaintiff and against the defendants, J. A. Jesson, James W. Hill and R. C. Wood, in the sum of \$7,500.00, on account of accrued interest on notes purchased from the partnership, which was paid to Barnette, Hill and Wood, and which is still uncollected.

XX.

The court erred in refusing to make and enter judgment in favor of the plaintiff and against the defendants J. A. Jesson, James W. Hill and R. C. Wood, in the sum of \$32,142.81 on account of the balance of accrued interest paid to Barnette, Hill and Wood on partnership notes purchased.

XXI.

The court erred in refusing to make and enter judgment in favor of the plaintiff and against the defendants J. A. Jesson, James W. Hill and R. C. Wood, in the sum of \$13,000.00 on account of the surrender of Wood's stock.

The foregoing assignments will be considered under the headings set out in the Brief of the Argument.

BRIEF of the ARGUMENT.

I.

PURCHASES OF STOCK OF THE STRANDBERGS, JOHNSON AND MCGINN.

- (a) Said purchases were illegal, wrongful and in violation of the laws of the State of Nevada under which said corporation was organized (F. 52, R. 192).
- (b) At the time said stock was purchased, said corporation had no surplus or undivided profits against which the same could be charged (F. 51, R. 192).
- (c) Said purchases were acquiesced in by the directors and in some instances were made under their direction and with their express approval (F. 54, R. 193).
- (d) The Strandberg and Johnson stock was not taken back by the bank in satisfaction of a pre-existing indebtedness (R. 214-217, substance of evidence thereon) ; but said stock was purchased or taken back pursuant to an established custom of the bank.
- (e) The taking back of the McGinn stock was a purchase by the bank pursuant to an established custom of the bank. Hawkins, the cashier, was acting as agent of the bank in so doing and not

for himself (F. 33, 44; substance of evidence thereon, R. 209-214).

—*In re S. P. Smith Co.*, 132 Fed. 618;
Shuey v. Holmes, (Wash.) 54 Pac. 540.

(f) The directors having authorized the advancement of the funds of the bank for the purpose of taking up the McGinn stock are liable therefor even though the stock was purchased for Hawkins individually.

—*Green v. Hedenberg*, (Ill.) 42 N. E. 851.

(g) These stock purchases were made in defiance of the laws of Nevada under which this corporation was organized and amount to a division of the capital among the stockholders.

—*Thompson v. Reno Savings Bank*, (Nev.)
7 Pac. 68.

(h) When a person becomes a member of a corporation organized under the laws of another state, he consents to be governed by the corporation laws of that state and his rights and liabilities are determined by the laws of that state.

—*Geissen v. London etc. Co.*, 102 Fed. 584, 42
C. C. A. 515;

Silver Mines v. Brown, 58 Fed. 644, 7 C. C.
A. 412;

Relfe v. Rundle, 103 U. S. 222, 26 L. ed.
337;

Railway Co. v. Gebbard, 109 U. S. 527.

- (i) The decisions of the Supreme Court of Nevada are controlling in the construction of its statutes.

—*Fairfield v. County of Gallatin*, 100 U. S. 50.

- (j) A corporation may not purchase its own stock when prohibited by statute, or out of its capital, or when to do so is prejudicial to creditors and other stockholders.

—Cook on Corporations (6th ed.), Sec. 311;
Thompson on Corporations, Secs. 1548,
2054;

Morawetz on Private Corporations, Sec.
112;

In re Smith Lumber Co., 132 Fed. 618;

Lowe v. Pioneer Threshing Co., 70 Fed.
646;

Tolman v. N. M. & D. Mica Co., (Dak.) 22
N. W. 505;

Vercoutre v. Golden State Land Co., (Cal.)
48 Pac. 375;

Kassler v. Kyle, (Col.) 65 Pac. 34;

Martin v. Zellerback, 38 Cal. 307;

F. N. B. v. Salem etc. Co., 39 Fed. 89, 95-97;

Commissioner v. Thayer, 94 U. S. 631, 643,
24 L. ed. 133;

Bank v. Lanier, 11 Wall. 369, 20 L. ed. 172;

Hall v. Alabama, etc. Co., 143 Ala. 468, 39
So. 285;

Currier v. Slate Co., 56 N. H. 262;

Hamor v. Taylor Rice Eng. Co., 84 Fed.
187;

Farrington v. Tennessee, 95 U. S. 679, 686;

In re Brocking Mfg. Co., (Me.) 35 Atl. 1012;

Tait v. Pigott, (Wash.) 80 Pac. 172;

Adams & Westlake Co. v. Deyette, 5 S. D. 418, 425, 8 S. D. 127;

German Sav. Bk. v. Wulfekuhler, 19 Kan. 60;

Hall v. Henderson, 126 Ala. 449, 28 So. 531;

Crandell v. Lincoln, 52 Conn. 73;

Com. Nat. Bk. v. Burch, 141 Ill. 519, 32 N. E. 420;

Clapp v. Peterson, 104 Ill. 26;

Bank v. Ross, 68 Conn. 29;

Rogers v. Ogden etc., 30 Utah 188;

New Eng. Trust Co. v. Abbott, 162 Mass. 148;

Blalock v. Kernerville Mfg. Co., 110 N. C. 99;

Van Brocklin v. Queen etc. Co., 19 Wash. 552.

(k) The cases of *In re Castle Braid Co.*, 145 Fed. 224; *Copper Bell Mining Co. v. Costello*, 95 Pac. 94, and *Barto v. Nix*, 46 Pac. 1033, are not opposed to the principle of the foregoing cases.

(l) The bank had a right of action against these faithless officers. The Receiver can enforce as an asset of the bank any remedy which the bank had.

—Zane on Banking, Sec. 86;

Coddington v. Canaday, (Ind.) 61 N. E. 567.

(m) Directors are liable for investment of the bank's funds *in ultra vires* or unauthorized or forbidden enterprises.

—1 Michie on Banks & Banking, pages 341, 342;

Cooper v. Hill, 36 C. C. A. 402;

Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662;

Trustees v. Bossieux, 3 Fed. 817;

Thompson v. Greeley, 107 Mo. 577, 591-2;

Marshall v. Bank, (Va.) 8 S. E. 586, 2 L. R. A. 534;

Oakland Bank v. Wilcox, 60 Cal. 126;

Stone v. Rottman, 183 Mo. 552, 82 S. W. 76, 83-84;

In re Brocking Mfg. Co., (Me.) 35 Atl. 1012;

Green v. Hedenberg, (Ill.) 42 N. E. 851;

Boswell v. Allen, 168 N. Y. 157, 55 L. R. A. 751;

U. S. v. Britton, 108 U. S. 199, 27 L. ed. 698;

Evans v. U. S., 153 U. S. 584, 38 L. ed. 830;

German Sav. Bk. v. Wulfekuhler, 19 Kan. 60;

Boyd v. Schneider, 65 C. C. A. 209, 131 Fed. 223;

Coddington v. Canaday, (Ind.) 61 N. E. 567.

- (n) Any by-law of this corporation which may have authorized it to make said stock purchases is void because in violation of the laws of Nevada.

—*State ex rel Corey v. Curtis*, 9 Nev. 325;

Herring v. Ruskin Co-op. Ass'n, (Tenn.)
52 S. W. 327;

Vercoutre v. Golden State Land Co., (Cal.)
48 Pac. 375;

Cooper v. Hill, 36 C. C. A. 402, 407.

II.

PURCHASE OF STOCK FROM WOOD.

- (a) Wood was a stockholder of the corporation (F. 13, 14, 15, 20, 27, 29).
- (b) He afterwards, on June 30, 1908, sold his stock to the corporation and received therefor \$13,000 of its funds. This transaction was with the knowledge, consent and approval of the officers and directors of the corporation (F. 30, 31, 32, 33, 54).
- (c) The purchase of said stock by the bank amounted to division of the capital, or a payment out of the money of the depositors, and was illegal, wrongful and in violation of the laws of Nevada (F. 51, 52).
- (d) This is not an action between the parties to a contract for rescission of a completed contract; but is an action against faithless officers and agents for diverting and dissipating the funds of the bank.

- (e) None of the exceptions sometimes recognized to the rule forbidding a corporation to purchase its own stock exist as to this transaction.
- (f) The principles and authorities applicable to the purchases of the Strandberg, Johnson and McGinn stock, heretofore listed, are applicable to this transaction. Under these principles and authorities, the officers and directors participating therein are liable to the Receiver herein.
- (g) In addition to the foregoing grounds for recovery on this item, this transaction was fraudulent. Wood was a member of the partnership known as Fairbanks Banking Company. Among the assets transferred by said partnership to the corporation then being organized and by which the pretended excess of assets over liabilities was created in an amount sufficient to entitle Wood to this stock, there were transferred past due and worthless notes and over-valued stocks in excess of such pretended surplus. This pretended surplus had no existence and the corporation received nothing for the stock issued to Wood for which it afterwards paid him \$13,000. The officers and directors acquiesced in this transaction and consented to it with full knowledge of these facts. Moreover two of such officers, Wood and Hill, appellees herein, were also members of the partnership and were personally interested adversely to the corporation (F. 22, 23, 24, 25, 35, 40, 47).

- (h) Officers and directors of a corporation are not permitted to make use of their power or of the corporate property for their own advantage. (See authorities cited under next subdivision.)

III.

THE PURCHASE OF WORTHLESS NOTES.

- (a) The partnership transferred to the corporation \$69,908.94 worth of notes which were at the time past due and worthless and still remain in the hands of the Receiver unpaid and uncollectible, and which were accepted by the officers and directors of the corporation at their face value (F. 22).
- (b) Of said notes were two executed by the Tanana Electric Company aggregating \$27,997.38 which depended for their value solely upon an alleged guarantee of the Scandinavian-American Bank, which guarantee never had any existence in fact and the claim therefor had been repudiated by said last named bank prior to the time said notes were so transferred and accepted, and said repudiation was known to the officers and directors of plaintiff bank. Said notes still remain unpaid. They were accepted and paid for by said officers and directors with knowledge that they depended for their value upon said alleged guarantee alone (F. 23, 24, 57).

- (c) Of said past due and worthless notes were also notes aggregating \$22,979.99 which said partnership was, at the time of said purchase, carrying on its books in a "Doubtful Account." Of said notes \$12,860.61 are still in the hands of the Receiver unpaid and uncollectible (F. 35).
- (d) The officers and directors accepted all of said notes with full knowledge on the part of each of them of the existence of the above facts (F. 57).
- (e) Appellees Hill and Wood were each personally interested in this matter adversely to the corporation of which they were also officers (F. 57). They should be held to the highest degree of fairness and good faith (see authorities cited below).
- (f) This is not an action for rescission of an executed contract, but one against faithless officers and agents for diverting and dissipating the corporate funds.
- (g) The purchase and acceptance of these worthless notes at their face value amounted to wilful and fraudulent misconduct by the agents of the corporation, and they are liable for such damages as resulted therefrom. They are also liable for failure to use that degree of care which a prudent man would have used under the circumstances.

—1 Michie on Banks & Banking, pp. 267, 296-297, 367;

Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662;

Wardell v. Railroad Co., 103 U. S. 651, 26 L. ed. 509;

Koehler v. Hubby, 67 U. S. 717, 17 L. ed. 339;

Stearns v. Laurence, 28 C. C. A. 66;

Trustees v. Bossieux, 3 Fed. 817,

Marshal v. F. & M. Sav. Bk., (Va.) 8 S. E. 586, 2 L. R. A. 534;

Ryan v. Railway Co., 21 Kan. 365;

F. & M. Bank v. Downey, 53 Cal. 466;

Wilbur v. Lynde, 49 Cal. 290;

Coddington v. Canaday, (Ind.) 61 N. E. 567;

Bosworth v. Allen, (N. Y.) 61 N. E. 163;

Kankakee Woolen Mills Co. v. Kampe, 38 Mo. App. 229;

Bundy v. Jackson, 24 Fed. 628.

(h) A pretended authorization of the proposed incorporators cannot shield the directors from liability for gross mismanagement against the claims of creditors of an insolvent corporation.

—*Bundy v. Jackson*, 24 Fed. 628;

Coddington v. Canaday, (Ind.) 61 N. E. 567.

IV.

THE PAYMENT OF ACCRUED INTEREST TO THE PARTNERSHIP.

(a) The partnership assets were transferred to the corporation at an agreed valuation, the terms of

which were embodied in a written instrument dated March 16, 1908. The transfer of the loans and discounts listed therein was for a fixed sum therefor (F. 15 and exhibit one to complaint, R. 44-62). This carried with it the right to all interest thereon both accrued and to accrue.

- (b) Subsequently, on March 23, 1908, the accrued interest on said loans and discounts was computed to March 15, 1908, in the sum of \$39,-642.81, which was placed to the credit of the partnership thereby increasing the liabilities of the corporation. This was acquiesced in by the directors with full knowledge of the facts (F. 36, 57). This was a clear gift to the partners of the funds of the bank.
- (c) In this transaction, Hill and Wood were also personally interested adversely to the corporation (F. 57) and again the requirement of good faith and fair dealing previously alluded to was violated.
- (d) In this item of accrued interest was also included interest on all of said past due and worthless notes (F. 32).
- (e) It would have required almost double the amount of this accrued interest to offset the past due and worthless notes transferred.
- (f) The pretended authorization of the proposed stockholders will not shield the directors for their gross and fraudulent mismanagement as

to this transaction. It was a wilful and wrongful diversion of the funds of the bank for which they are liable.

—Michie on Banks & Banking, 296, 297;

Coddington v. Canaday, (Ind.) 61 N. E. 567;

Bosworth v. Allen, (N. Y.) 61 N. E. 163;

Wardell v. Railroad Co., 103 U. S. 651, 26 L. ed. 509;

Ryan v. Railway Co., 21 Kan. 365;

Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662;

Cooper v. Hill, 36 C. C. A. 402, 407;

Bundy v. Jackson, 24 Fed. 628.

V.

INTEREST ON MONEY INVESTED IN FIRST NATIONAL BANK STOCK.

(a) The funds of the plaintiff bank were tied up in this stock for an entire year. Said stock was on May 4, 1910, sold by said bank to appellees Wood and McGinn at the original purchase price and pursuant to an option previously given. At the time of said sale the appellees Jesson, Brumbaugh, Wood and McGinn were officers of plaintiff bank. Nothing was ever realized on said investment by plaintiff bank either as a dividend on the stock or as interest on the money invested (F. 55, 59).

- (b) The carrying of the stock in this manner and the subsequent sale thereof was a misappropriation of the bank's funds and enabled Wood and McGinn to have the use of the bank's funds for a year without cost to them.
- (c) This is another instance of the officers of the bank safe-guarding their own interests to the prejudice of the bank, and in it their fellow officers acquiesced and are equally involved. The same principle of good faith and fair dealing in the management of corporate funds, heretofore considered, should apply here.
- (d) The measure of damages is interest on the money so misappropriated at the legal rate of 8%.
—*Cooper v. Hill*, 36 C. C. A. 402, 409.

VI.

INTEREST ON FOREGOING ITEMS.

- (a) Appellee is entitled to interest on each of the foregoing items at the legal rate of 8% per annum from the date of each misappropriation of funds.
—*Cooper v. Hill*, 36 C. C. A. 402, 409;
Burrows v. Niblack, 28 C. C. A. 130;
Bundy v. Jackson, 24 Fed. 628.

ARGUMENT.

I.

The Strandberg, Johnson and McGinn Stock Purchases.

- (a) APPELLANT IS ENTITLED TO JUDGMENT AGAINST APPELLEES, JOHN A. JESSON, JAMES W. HILL AND E. R. PEOPLES, JOINTLY AND SEVERALLY FOR \$12,000 FOR THE PURCHASE BY THE BANK OF THE STOCK OF STRANDBERG BROS., EMMA STRANDBERG AND B. E. JOHNSON.
- (b) APPELLANT IS ENTITLED TO JUDGMENT AGAINST APPELLEES, JOHN A. JESSON, RAY BRUMBAUGH, JOHN A. CLARK, J. A. HEALEY AND GEORGE PRESTON, JOINTLY AND SEVERALLY, FOR \$6,000 FOR THE PURCHASE OF THE JOHN L. MCGINN STOCK.

The court's Findings of Fact respecting these transactions in particular, and which are hereinbefore set out in full, are Nos. 32, 33, 44, 45, 48, 49, 50, 51, 52, 53 and 54, the substance of which is as follows:

There was a resolution of the board of directors of said bank requiring monthly statements, showing the condition of the bank, to be presented to said board and in accordance with said resolution there was, during the existence of the bank, presented to the board at each monthly meeting a statement show-

ing the condition of the bank, which statement was examined in detail by the board and by them ordered filed (F. 32). At the meeting of the board on July 13, 1908, while the board was considering a written report showing in detail the condition of the affairs of the bank, the question of refunding to those desirous of giving up their stock in the bank was discussed, and it was the sense of the meeting that any stockholder desirous of giving up his stock should be paid for the same and the stock returned to the treasury of said bank (F. 33). This meeting was held following the taking up of the Wood's stock in the sum of \$13,000 on June 30, 1908, which is hereinafter charged as a ground for recovery by the appellant. After taking up the Wood's stock, "frequent and continuous" surrenders of stock were made by the stockholders, amounting in all to thirty-eight different and distinct transactions aggregating \$43,000 exclusive of said Wood's stock. Stock so taken back by the bank was charged to treasury stock, and of the same only ten shares of the par value of \$1,000 were ever reissued. Said stock surrenders continued down to and including October 25, 1910, when the McGinn stock of the par value of \$10,000 was taken up, for which the sum of \$6,000 in cash was paid by the bank to McGinn (F. 44).

That on November 18th, 1908, the stock of Strandberg Brothers (100 shares), Emma Strandberg (10 shares) and B. E. Johnson (10 shares), which would aggregate a par value of \$12,000 was

taken up by the bank in part payment of a loan that the bank had theretofore made to Strandberg Bros. & Johnson, mining co-partners, and the bank also received at said time the further sum of \$4,000 in cash; that said transaction amounted to the taking of stock for a pre-existing debt, rather than a purchase of stock by the directors; and that said directors believed at said time that said loan was precarious, and, in taking said stock in partial satisfaction of said loan, they acted in good faith believing it to be for the best interests of the corporation (F. 45).

That John L. McGinn, the owner of 100 shares of the outstanding stock of said bank of the par value of \$10,000 (F. 48), on October 13, 1910, demanded the right as a stockholder to inspect the books and papers of said bank and threatened that, unless such right was immediately granted, he would make application for an order permitting him to do so and also for the appointment of a Receiver; that the directors, fearing that information obtained by such investigation would be used by McGinn in promoting the interests of the First National Bank and that, if litigation was started, it would impair public confidence and perhaps start a run on the bank, authorized the cashier to loan a purchaser sufficient funds to pay for McGinn's stock, one of the directors stating at said time that he had a purchaser who would purchase the same for \$6,000, but that it would be necessary for him to borrow the money to do so; that the matter being urgent and a purchaser not immediately avail-

able, the cashier purchased the stock in his own name, gave his note to the bank for the purchase price thereof, and paid to McGinn \$6,000, the proceeds of said note, for his 100 shares of stock; that thereafter, on or about October 25, 1910, said cashier, without the knowledge of any of the directors, cancelled his note, charged the amount thereof to the bank and surrendered the stock to the bank, and the stock was thereafter held as treasury stock (F. 49). That appellee Preston on account of sickness did not attend said meeting of the board of directors on October 13, 1908, and knew nothing of the action taken at the meeting of said board.

That from October 14, 1908, to March 13, 1909, the appellees Jesson, Hill and Peoples were members of the board of directors (F. 53), during which time to-wit, in November, 1908, the stock of the Strandbergs and Johnson was taken up; and from January 19, 1910, to October 25, 1910, the appellees Jesson, Brumbaugh, Clark, Healey and Preston were members of the board of directors (F. 53), during which time, to-wit, on October 13, 1910, the McGinn stock was taken up.

The court further found generally as to all stock purchased by the bank as follows:

LI.

“ That when stock was so taken back by the corporation, the amount paid therefor was either paid in cash or notes held by the bank were cancelled and surrendered by the stockholders.

“ The said bank had no surplus or undivided profits against which the same could be charged.”

LII.

“ That the taking back of said stock and the payment therefor as aforesaid was illegal, wrongful, and in violation of the laws of the State of Nevada under which said corporation was organized.”

LIV.

“ That said stock surrenders so made as aforesaid were acquiesced in by said directors, and in some instances were made under their directions and with their express approval.”

On these Findings, the court concluded as a matter of law that the appellees Jesson, Hill and Peoples were not liable for the purchase of said \$12,000 worth of stock from Strandberg Brothers, Emma Strandberg and B. E. Johnson, and dismissed appellant's action therefor (C. of L. 8, R. 199; Decree 9, R. 203). As to the purchase of the McGinn stock, the court allowed no recovery against appellees Jesson, Brumbaugh, Clark, Healey and Preston, directors at the time of said purchase, and dismissed appellant's action therefor (C. of L. 8, R. 199; Decree 8 and 9, R. 202, 203). Appellant proposed Conclusions of Law Nos. 6 and 10 (R. 205-6) allowing him recovery against said appellees on said items, which were denied.

Appellant excepted to Findings of Fact Nos. 45 and 49 (R. 217-218), and also excepted to the denial

by the court of said proposed Conclusions of Law Nos. 6 and 10 (Exs. 9, 10; R. 220), and also excepted to said dismissal (Exs. 12, 13, 14; R. 220-221). The above matters are assigned as error in Assignments of Error Nos. 1, 2, 9, 10, 12, 13, 14, 15, 16 (R. 227-8, 230-2).

Appellant complains of said Finding of Fact No. 45 to the effect that the purchase of the stock of said Strandberg Brothers, Emma Strandberg and B. E. Johnson amounts to the taking of stock in good faith in partial satisfaction of a pre-existing debt rather than a purchase of stock by the board of directors. The substance of the whole of the testimony upon which said finding was based is preserved in appellant's bill of exceptions (R. 214 to 217) which is as follows:

“ That the substance of the whole of the testimony offered and received on the trial concerning the surrender of said stock of the said Strandberg Brothers, Emma Strandberg and B. E. Johnson was that the said Strandberg Brothers and the said B. E. Johnson were mining copartners and that the said Emma Strandberg was the wife of one of the said Strandbergs, and that on the 5th day of November, 1908, the said Strandberg Brothers were the owners of 100 shares of capital stock of said bank of the par value of \$10,000.00 and the said Emma Strandberg was the owner of 10 shares of said stock of the par value of \$1,000.00 and the said B. E. Johnson was the owner of 10 shares of said stock of the par value of \$1,000.00; that on the 5th day of November, 1908, it was resolved by the

executive committee, the defendant Hill being present as a member thereof, that a loan of \$15,000.00 be made to Strandberg Brothers on the security of their 110 shares of Fairbanks Banking Company stock and notes aggregating \$2,500.00, and that thereafter, on November 12, 1908, at a meeting of the board of directors at which the defendants, J. A. Jesson, E. R. Peoples and James W. Hill were present, the minutes of the meeting of the executive committee held on said November 5, 1908, were read, and on motion duly made and seconded, were approved, ratified and passed as the action of said board. That pursuant to said proceedings a note in the sum of \$17,050.00 payable to said bank, was executed by David Strandberg and Strandberg Brothers & Johnson, dated November 5th, 1908, due May 31, 1909, *and the proceeds thereof in the sum of \$15,000.00 was placed to the credit of Strandberg Brothers & Johnson in their deposit account*, and the said note of \$17,050.00 was secured by the said stock of the said Strandberg Brothers and Johnson as collateral.

“ That at a meeting of said executive committee held on November 18, 1908, the defendants, J. A. Jesson and James W. Hill being present as members thereof, the matter of taking over the Strandberg Brothers and Johnson stock was discussed, and the minutes thereof further reciting that ‘In taking over this stock the proceeds were to apply to the taking up of the loan of Strandberg Brothers to the bank. It was moved by Ryan, seconded by Jonas, that Mr. J. A. Jesson take up the stock of Strandberg Brothers and Johnson at par on behalf of the bank. Motion carried.’ That at a meeting of the

board of directors held on December 12, 1908, at which the defendants James W. Hill, E. R. Peoples and J. A. Jesson were present as members thereof, the minutes of said meeting of the executive committee held on said November 18, 1908, were read, and on motion duly made and seconded were approved, ratified and passed as the action of the board.

“ That on November 19, 1908, said note was cancelled and surrendered to the makers thereof, and said bank took up and cancelled the said stock of the said Strandberg Brothers and the said B. E. Johnson, aggregating \$11,000.00 as aforesaid, and in addition thereto received from said Strandberg Brothers and Johnson the sum of \$4,000.00 in cash. *Said stock was charged to the account of Treasury stock and the deposit account of Strandberg Brothers & Johnson was credited \$15,000.00 and subsequently the same was withdrawn by them. Afterwards, on November 25, 1908, the deposit account of Emma Strandberg was credited \$1,000, being the par value of her said stock, and her 10 shares of stock cancelled and charged to treasury stock, and the amount so credited to her account was subsequently, to-wit, on February 16, 1909, drawn out by her. That said board of directors believed, at the time said stock was taken up, that said loan was precarious, and said directors in taking said stock in partial satisfaction of said loan did so in good faith and in the belief that it was for the best interest of said corporation. That in order to get the said Strandberg Brothers & Johnson to take up said note and make said cash payment as aforesaid, it was necessary to include in said settlement the said stock of the said Emma Strandberg.*”

It will be seen from this testimony that on the 5th day of November, 1908, the executive committee resolved to make a loan to said Strandberg Brothers in the sum of \$15,000 on the security of 110 shares of stock of the Fairbanks Banking Company and notes aggregating \$2500 and this resolution was afterwards approved by the board of directors on November 12th, 1908. Pursuant to these proceedings a note was executed by David Strandberg and Strandberg Brothers & Johnson, dated November 5th, 1908, due May 31, 1909, and the proceeds thereof in the sum of \$15,000 were placed to the credit of Strandberg Brothers & Johnson. Undoubtedly, a corresponding charge was made to the loan account to balance the transaction. It does not definitely appear what day said note was executed, but inasmuch as it was done pursuant to the above proceedings it could not have been at an earlier date than November 12th, 1908. On November 18th, 1908, at the very most but six days after the execution of the note, the executive committee, at a meeting at which said Jesson and Hill were present as members, discussed the matter of taking over said stock and decided that in so doing "the proceeds were to apply to the taking up of the loan of Strandberg Brothers to the bank," and upon motion it was decided "to take up the stock of Strandberg Brothers & Johnson at par on behalf of the bank."

On November 19, 1908, at the most but seven days after the execution of said note and the placing of the proceeds thereof to the credit of Strandberg

Brothers & Johnson, said note was cancelled and surrendered to the maker thereof, and the stock of the said Strandberg Brothers & Johnson aggregating \$11,000 together with the sum of \$4,000 in cash was received by the bank. *The stock was charged to the treasury account, and the deposit account of Strandberg Brothers & Johnson was credited with \$15,000, which was subsequently withdrawn by them.* By these means Strandberg Brothers & Johnson got \$15,000.00 of the bank's funds and also their cancelled note in the principal sum of \$15,000.00. All they ever gave up in return for these items was \$4,000.00 in cash and stock of the par value of \$11,000.00, aggregating \$15,000.00 in all. The proceeds of the note having been credited to them, there must have been a corresponding charge to them when the note was cancelled, leaving the remaining credit to them to arise out of said stock and cash.

Afterwards on November 25th, 1908, Emma Strandberg surrendered her 10 shares of stock and received a credit of \$1000 which was subsequently drawn out by her.

The above action of the executive committee respecting the taking up of said stock was approved by the board of directors on December 12th, 1908, at which meeting the appellees Hill, Peoples and Jesson were present as members thereof. That said directors acquiesced in said stock purchase is found by the court in Finding No. 54.

Said stock purchase was in full accord with the previous dealings of the bank. After the purchase of the stock of R. C. Wood in the sum of \$13,000 on June 30th, 1908, up to and including November 25th, 1908, a period of approximately five months, said bank took up \$28,000 of its stock (F. 30 and 53), or a total of \$41,000.00 within nine months after commencing business. The court found that after the said purchase of the Wood's stock of \$13,000, "frequent and continuous surrenders of its stock were made by its stock holders" (F. 44). The purchase of the Strandberg and Johnson stock was in keeping with and pursuant to the policy of the bank expressed at the meeting of the board of directors on July 13, 1908, "that any stockholder desirous of giving up the stock be paid for the same and the stock returned to the treasury of said bank" (F. 33).

In the light of these proceedings the claim now made that the board of directors, within a week after making said loan realized that the loan was "precarious" and that said purchase was made in partial satisfaction of a "pre-existing debt," was an afterthought. The proceeds of said note, \$15,000, were placed to the credit of said Strandberg Brothers & Johnson. At the time the stock was taken back, the same was charged to the account of treasury stock and their deposit account was credited with \$15,000, which was subsequently withdrawn. If the purchase was made for the purpose of cancelling said note why was the \$15,000 placed to their credit and they per-

mitted to withdraw the same? This credit of \$15,000 was derived from the \$4,000 cash and the \$11,000 stock surrender. If this stock and cash were used by the bank for the purpose of taking up the note, the same became the property of the bank and the proceeds thereof would not have been placed to the credit of Strandberg Brothers & Johnson and *subsequently withdrawn by them.*

Just how the bookkeeping of these transactions was handled does not appear in detail. The net result was two credits to Strandberg Brothers & Johnson of \$15,000.00 each, one of which was the proceeds of said note, and the other the stock (\$11,000.00) and cash (\$4,000.00). The stock, the court found, was charged to "Treasury Stock." The cash received must have been charged to "Cash." When the note was cancelled it was necessary to balance the loan account by a credit thereto, and the only proper account for the corresponding charge would be that of Strandberg Brothers & Johnson. This would then leave to their credit the \$15,000 to be subsequently withdrawn by them in cash, and the stock and note entries completely balanced.

On the theory that said stock and said \$4,000 in cash took up said loan which had so suddenly become precarious, wherein was the bank benefited? The note was not due until May 31st following. The loan was made on the security of said \$11,000 worth of stock and notes aggregating \$2,500. This security was just as available on May 31st as on November

19th. Strandberg Brothers & Johnson were miners. The credit of such classes of men in the Fairbanks region may have been fluctuating; but there was only an unsecured margin of \$1,500 to be affected by these fluctuations. It further appears that in order to get said cash of \$4,000 it was also necessary to include the taking up of the stock of Emma Strandberg in the additional sum of \$1,000, and this sum was subsequently paid to her. The bank then in reality received but \$3,000 in cash to apply toward the taking up of this note, which, together with the \$11,000 worth of stock belonging to Strandberg Brothers & Johnson, aggregates \$14,000, assuming that the stock was worth par. In return for this the bank surrendered said note of \$15,000 thereby electing to take a loss of \$1,000 within one week after the loan was made, while it could have lost but the unsecured balance of \$1,500, if it had waited until the note matured. If the bank had carried the loan to its maturity, it would not have lost to exceed \$500 more than it did lose by accepting the stock and cash aforesaid in payment of the note on November 19th. The capital of the bank was already impaired by previous purchases of its stock by the bank; yet these directors "in good faith" further impaired it to the extent of \$12,000.00 to save a possible increased loss of \$500 six months afterwards. If the entire \$2,500 worth of collateral notes were worthless, the bank would have been no worse off in that respect when the Strandberg Brothers & Johnson note became due. Of course, it would not have received the cash payment

of \$3,000: neither would its capital have suffered the further impairment of \$12,000. The proceeds of the stock would have remained in its possession for the benefit of its creditors instead of being withdrawn by favored stockholders. With all respect for the judgment of the lower court, it is submitted that this transaction was not had in good faith and for the purpose of satisfying a pre-existing debt. It was simply a blind to cover up an illegal transaction. The debt came into existence contemporaneously with the pledging of the stock as collateral and was therefore not pre-existing.

When said stock was taken back before the maturity of the loan which it was pledged to secure, it can not in fairness and good reason be said to have been taken back in payment of a pre-existing debt.

Regardless, however, of the good faith of the directors or the question of pre-existing indebtedness, the fact remains as found by the court in Finding 52 that the taking back of this stock was "illegal, wrongful and in violation of the laws of the State of Nevada under which said corporation was organized." Whether or not the debt was pre-existing, or whether or not the directors acted in good faith, the transaction was prohibited by law. The law applicable to this matter will be considered later in connection with the purchase of the McGinn stock.

Appellant further complains of Finding of Fact No. 49 relating to the purchase of the McGinn stock.

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The testimony upon which this finding of fact is based clearly discloses that the cashier who conducted this transaction was acting therein as the agent of the bank and that, although the purchase was made in his name, it was made for the bank; hence when the cashier surrendered this stock to the bank after such purchase he only consummated the real transaction.

The substance of the testimony upon which this finding is based is as follows:

“ That the substance of the whole of the testimony introduced and received on the trial of said cause respecting the matter of the surrender of said stock of said McGinn is as follows, to-wit:

“ That, at the time when the defendants George Preston, J. A. Healey, and John A. Clark were directors of the said Washington-Alaska Bank and about the month of October, 1910, and prior to the twelfth day of said month, John L. McGinn, who had theretofore been a director of said Washington-Alaska Bank, formerly Fairbanks Banking Company, and who had for a number of years been attorney for said bank, and was the owner of 100 shares of the capital stock thereof, notified the vice-president and manager of said bank, J. Albert Jackson, that he intended to exercise his rights as a stockholder to examine all the affairs of said bank and would do so, and further stated that he would sell his stock for the sum of \$6,000.00. That the stock of said John L. McGinn was of the par value of \$10,000.00; that he had received \$2,000.00 in dividends and that he was willing to

sell said stock for the sum of \$6,000.00; that he was one of the owners of the F i r s t National Bank of Fairbanks, having recently acquired that property, and that he needed all the money he could get; and that, as the First National Bank was a rival bank of the Washington-Alaska Bank, he did not desire to have any stock in the said Washington-Alaska Bank.

“ That an intense rivalry existed between said banks at said time, and there was keen competition in the purchase of gold-dust and the acquiring of banking business, and said John L. McGinn notified said J. Albert Jackson, vice-president and manager of the Washington-Alaska Bank, that he would exercise his right as a stockholder to demand an inspection of the books of said Washington-Alaska Bank and other records, thus enabling him to secure information respecting the clients, customers, creditors and debtors of the said Washington-Alaska Bank that could be by him used to the advantage of said First National Bank and greatly to the detriment of said Washington-Alaska Bank.

“ That said demand and said statements were by said J. Albert Jackson reported to the board of directors, or the greater part thereof, and an informal discussion was had by a number of said directors as to what was advisable to be done; that it was also reported by said vice-president and manager, J. Albert Jackson, that said McGinn had threatened that if his demand for an inspection of the books and records of said bank was not complied with he would bring a suit against the said Washington-Alaska Bank as a stockholder thereof, asking for the appointment of a receiver, on the ground that, as a stockholder he was refused information that he

was entitled to receive, and on the further ground that the officers of said Washington-Alaska Bank were mismanaging said bank, in that they were paying more for gold-dust than they were justified in paying, and for other acts.

“ That D. H. Jonas, one of the directors of said bank, stated to the directors, including said defendants, that he was satisfied that he could find a purchaser for said stock at the said price of \$6,000.00; that thereafter and on the 12th day of October, 1910, at the regular monthly meeting of the directors of the Washington-Alaska Bank, the matter was considered by the board of directors and it was then reported by said D. H. Jonas, that he had not been able to see the prospective purchaser, but that he was satisfied that prospective purchaser would take said stock and would probably require a loan from the bank, as he did not at that time have sufficient money to make such purchase; that it was again reported by the vice-president and manager that said John L. McGinn was insistent on said matter and demanded that it be closed at once.

“ That at said meeting of 12th October, 1910, it was moved, seconded and duly carried that ‘The officers extend a loan to the party to whom McGinn would sell and retain the stock in the bank as collateral.’ That it was reported at the said meeting by said D. H. Jonas that it might be some days before the prospective purchaser could be reached, and it was then decided by said board of directors, that, if it became necessary to prevent action being taken by said John L. McGinn, F. W. Hawkins, the cashier of the bank, be loaned the money necessary to pay for the stock, to-wit, the sum of \$6,000.00, and that said

stock be held as collateral security for said loan, and that, when the prospective purchaser could be communicated with, a new loan could be made to said purchaser and the stock be issued to said purchaser and be held by the bank as collateral security for such new loan.

“ That, in accordance with said agreement, said F. W. Hawkins borrowed from the said bank the sum of \$6,000.00 which he paid to said John L. McGinn for said stock and said stock was assigned by the said McGinn in blank and said F. W. Hawkins executed his note to said bank for said sum.

“ That thereafter, and without the knowledge, consent or approval of the board of directors, or of said defendants, as members of said board, said F. W. Hawkins cancelled his note and returned said stock to the bank, and said defendants knew nothing of said transaction until after said bank was closed.

“ That the directors of said Washington-Alaska Bank had with them employees whom they trusted and who were under bond, and who had theretofore, so far as said defendants had knowledge or information, strictly performed the orders given to them by the board of directors; that the board of directors had no information concerning the subsequent action of said F. W. Hawkins with regard to said stock until after the suspension of said Washington-Alaska Bank.

“ That said directors refused in behalf of said bank to purchase said stock from said John L. McGinn, and did not purchase said stock, and the surrender of said note by said F. W. Hawkins was wrongful and without authority.

“ That no information was furnished to said board of directors that would lead them to believe that the officers of said bank had done or performed any act or thing contrary to the instructions given, and said defendants were never informed that the purchaser whom said D. H. Jonas claimed to be available had not purchased said stock.

“ That at the time it was voted to loan said money to the purchaser of said stock, said stock was considered by said board of directors to be worth a sum in excess of \$6,000.00 and said loan was considered a perfectly safe loan, and said directors had no reason to believe that said bank was not in a perfectly solvent condition or that the McGinn stock was not worth the full sum of \$6,000.00.

“ That had said McGinn been permitted the rights claimed by him as a stockholder and examined into the affairs of said bank, with a view of ascertaining its clients, customers, creditors and debtors, it would have caused said bank great irreparable damage and would have resulted to the benefit and advantage of the First National Bank, of which said John L. McGinn was one of the principal owners.”

The facts clearly disclose that the cashier was acting as agent of the bank. He took up the stock with the funds of the bank, for the convenience of the bank, and not as an investment of his own. He held it simply as a trustee for the bank, for the purpose of disguising the transaction, until someone could be found who would take the stock, which was never done. When he subsequently cancelled his note

and delivered the stock to the bank, he did nothing more than complete the real transaction. The legal title to the stock never was in him. None of the personal funds of the cashier were invested, and it never was intended by this transaction to hold him as the purchaser of the stock. McGinn gave up his stock on the 13th of October, 1910, and the cashier on the 25th day of October, but twelve days afterwards, cancelled his note, charged the amount thereof to the bank, surrendered the stock to the bank, and the said stock was thereafter held as treasury stock.

This transaction ended a long line of stock purchases aggregating \$56,000. McGinn and other favored stockholders got their money, and less than three months later this financial delirium which has been called a bank was turned over to receivers. The general course of the bank's dealing in the matter of stock surrenders, conducted with the approval of its directors, makes a farce of their whimsical resolutions on the subject, and a pretense of their claims of good faith as to some particular transaction.

A transaction almost identical to the McGinn purchase was presented to the United States District Court for the Northern District of Texas, *In re S. P. Smith Lumber Company*, 132 Fed. 618. In that case one Smith and one Manafee owned substantially all the shares of a corporation's stock and they together with one other constituted the board of directors. The affairs of the company being in an unsatisfactory and precarious condition, Manafee was anxious to dispose of his interests in the company and insisted that

Smith buy him out and as a means for accomplishing his purpose threatened Smith with a receivership. In order to "get rid of him" Smith bought him out by transferring to him certain promissory obligations of the company together with a sum of money from the funds of the company and took the transfer of the stock to himself. The court said:

" The Manafee shares were transferred to S. P. Smith but the consideration for the transfer flowed from the company. In view of this fact the transaction was no doubt a purchase by the company of its own shares."

The case at bar is much stronger than the *Smith* case, because in it the purchase was made by the cashier with the funds of the bank, at the request of the bank, and for the convenience of the bank.

In *Shuey v. Holmes*, (Wash.) 54 Pac. 540, Shuey as receiver of a bank sued Holmes to recover on a note given by Holmes to the bank. It appeared that it was represented to Holmes by the bank that it had come into possession of some of its own stock, including the shares in question, which it was contrary to law for it to hold, and at its request Holmes took 30 shares of the stock temporarily and gave his note therefor until the stock could be sold, and paid for by an actual purchaser. As an accommodation to the bank Holmes took the stock and executed and delivered the note sued on. It was held that by such transaction Holmes incurred no liability to the said bank on said note.

The court having found (F. 52) that the taking back of the Strandberg, Johnson and McGinn shares of stock, and the payment therefor, was illegal wrongful and in violation of the laws of the State of Nevada, judgment should be entered in favor of the appellant on these transactions against the directors and officers participating in such transaction. One can not shield himself against the consequences of a violation of positive law under the cloak of expediency and good faith. If the court believes that Hawkins really was the purchaser of the stock and did not buy it as the agent of the bank, the fact still remains that he made the purchase with the funds of the bank and with the approval of the directors. In *Green v. Hedenberg*, (Ill.) 42 N. E. 851, a group of stockholders sold to another group of stockholders and others 864 shares of the capital stock of a corporation. The officers of said corporation permitted \$15,200 of corporate funds to be used in making part payment on the purchase. Although it was found that the stock was purchased for the individuals and not for the corporation, still the court held that the officers, having advanced corporate funds to the vendees of the stock in order to enable them to purchase, were personally liable to a creditor of the corporation, and ordered that they pay.

The general right of a corporation to purchase its own stock has been frequently before the courts and they are divided upon the question. The courts of England have established and rigidly adhered to

the rule that a corporation can not become the purchaser of its own shares. (Cook on Corporations, Sec. 309.) In the United States where such right has been allowed it is generally derived from statute; or, in the absence of a statute positively prohibiting it, the offending corporation was acting within some recognized exception of the rule prohibiting it, as where for instance it was not prejudicial to the rights of creditors or stockholders, or where the purchase was not made out of the capital but out of the surplus or undivided profits. In the case at bar the purchase was not only made out of the capital of the bank, or with the money of the depositors, but was prohibited by law. The bank had neither surplus nor undivided profits against which the same could be charged (F. 51). It was hopelessly insolvent when it commenced buying up its outstanding stock, as will be seen by the following review of the facts found by the court:

In addition to this frequent and continuous depletion of its assets by said stock purchases, the court found that from its inception the bank carried as an asset past due paper, taken over from the partnership which the bank succeeded, and which is now in the hands of the receiver "unpaid and uncollectible" aggregating \$69,908.94 (F. 32), included in which are the notes of the Tanana Electric Company of \$27,997.38, which were at all times utterly worthless (F. 33), and that the bank always had, and still had at the time this case was tried below, \$341,949 of its assets, or \$135,949 more than its maximum outstand-

ing capital, tied up in the capital stock of the Gold Bar Lumber Company (F.39), which said investment was eating itself up in the purchase and repair of equipment and never earning a dollar of profit (F. 40) ; that on March 23, 1908, its assets were further depleted by a gift as a credit to the partnership composed of Barnette, Hill and Wood of \$39,642.81, accrued interest on the loans taken over from said partnership on the organization of the corporation bank (F.36), of which loans the Receiver now has the above mentioned \$69,908.94, which are uncollectible. At the time the corporation took over the partnership, the partnership assets were accepted at a valuation of \$790,940.31 and its liabilities at \$538,940.31, leaving an apparent excess of \$252,000 belonging to said partners (F. 15) for which they were issued stock to the amount of \$52,000 and the remaining \$200,000 placed to the credit of Barnette and subsequently drawn out by him in cash (F. 45). Adding together these items of past due and uncollectible notes, the credit to the partnership of said accrued interest, stock issued to partnership, and the Barnette credit item, they total \$361,551.75, which immediately became additional liabilities of the corporation, and ran its total liabilities up to \$900,492.06, or \$109,551.75 in excess of its resources counting Gold Bar Lumber Company stock as of full value. This was the real condition of the bank when it commenced business on March 16, 1908, with a "subscribed and outstanding capital stock of \$206,000, only a small portion of which was paid in cash" (F. 39). On the following

June 30th, it commenced buying in its outstanding capital stock, although all of it but \$96,448.25 was already wiped out by said initial liabilities, and kept it up until \$56,000 worth was bought in and paid for out of the funds of the bank; and the Receiver still owes \$470,000 in excess of the value of its assets now in his hands (F. 66).

The reason for denying a corporation the right to repurchase its own stock is generally grounded upon the principle either that the capital is a trust fund upon which the creditors have a prior claim over stockholders, or that creditors have a right to rely upon some added liability which attaches to one owning stock over and above the amount invested in such stock. In either case it is considered contrary to sound public policy to permit the stockholders to divide among themselves the fund to which the creditors look for the payment of their claims. Again it is prejudicial to the other stockholders. It is highly inequitable to allow one stockholder, without the consent of the others, to withdraw his share of the common venture leaving all the others to risk what they have ventured in a joint enterprise. If the offending corporation had such right and exercised it to the full limit, all of its capital could be distributed to its stockholders, or certain favorite ones, leaving the creditors and other stockholders only its promises to pay. Of course the right to re-issue the stock would be existent but what could that avail when its assets have been depleted or consumed? Stock which merely

evidenced a liability to assessment would not avail creditors much in satisfying their claims.

In his work on Corporations, section 311 (6th ed.), Mr. Cook, after alluding to the differences of opinion in the American courts as to the rights of a corporation to purchase its stock, says:

“ The objection usually made to allowing a corporation to purchase its own stock is that thereby the corporate funds are expended and no property is received by the corporation, except the right to resell. This objection is merely a limit to the power of the corporation to purchase. In Illinois, the state where the right of the corporation to make such purchases is most clearly and decisively established, *the collateral principle* that such purchases are to be declared illegal and voidable at the instance of corporate creditors who are injured thereby is distinctly stated and rigidly applied. If the corporation is insolvent at the time of the purchase, it is clearly an invalid transaction, and will be set aside. The rule goes still further, and declares that if a corporation, by a purchase of shares of its own capital stock, thereby reduces its actual assets below its capital stock and debts, or if the actual assets at that time are less than the capital stock and debts, such purchase may be set aside, and the *guilty corporate officers*, as well as the vendor of the stock, may be rendered liable thereon at the instance of a corporate creditor.”

In Thompson on Corporations, section 1548, it is said:

“ For a corporation to repurchase its shares at a price which the subscriber has paid for them is simply to distribute the trust fund of creditors, hereafter spoken of, among those from whom it was originally collected. That this can not be done as against creditors, if it has any, is plain. That it can not be done as against shareholders is equally plain. In the absence of special circumstances, such as rendering allowable compromises, it is safe to say that this can not be done as against other shareholders, in the absence of statutory authorization, *without unanimous consent*. For this reason, *the general rule is that a corporation can not purchase and hold its own shares.*”

Again at section 2054, the same author says:

“ The capital stock of a corporation being a trust fund for creditors, *the general rule, in the absence of an enabling statute, is, that a corporation cannot employ its funds in purchasing its own shares*, thus distributing its capital among its shareholders to the manifest detriment of its creditors. As was observed by Lord HERSCHEL, L. C.: ‘Stringent precautions to prevent the reduction of the capital of a limited company without due notice and judicial sanction, would be idle if the company might purchase its own shares wholesale,’ and if it were otherwise, the result would be that the shareholders would receive back the money subscribed, and there would thus pass into their pockets what before existed in the form of cash in the coffers of the company, or of buildings, machinery, or stocks available to meet the demands of the creditors. And he also held that the purchase of shares for the purpose of reselling would be a trafficking or dealing in

shares and unlawful. *The rule which forbids a corporation thus to employ its funds rises to the grade of a rule of public policy; and is so strong that, although power is conferred upon the company to deal in the shares of joint-stock companies generally, this does not authorize it to deal in its own shares. It is immaterial whether the transfer is made to the company itself, or to a nominee of the directors to hold in trust for the company; in the latter case, equally with the former, it is invalid.*"

In Morawetz on the Law of Private Corporations, section 112, it is said:

" A purchase by a corporation of shares of its own stock in effect amounts to a withdrawal of the shareholder whose shares are purchased from membership and a repayment of his proportionate share of the company's assets. There is no substitution of membership under these circumstances as in case of a purchase and transfer of shares of a third person, but the members of the company and the amount of its capital are actually diminished. Whatever a transaction of this character may be called in legal phraseology, it is clear that it really involves an alteration of the company's constitution, just as the withdrawal of a member of a co-partnership with his proportionate share of the joint funds involves an alteration of the constitution of a co-partnership. The amount of the company's assets and the number of its shareholders are diminished. Every continuing shareholder is injured by the reduction of the fund contributed for the common venture; and the creditors who have trusted the company upon the security of

the capital originally subscribed, or who are entitled to expect that amount of security, are entitled to complain.

“ It is no answer to say that shares having a market value must be regarded like any other personal property, and that no person is injured if a solvent corporation in good faith purchases shares in itself at their market value, inasmuch as the shares so purchased are property in the hands of the company and may at any time be reissued or sold. No verbiage can disguise the fact that a purchase by a corporation of shares of itself really amounts to a reduction of the company's assets and that the shares purchased in fact remain extinguished, at least until the reissue has taken place. The fact that such a transaction may not necessarily be injurious to any person is not a sufficient reason for supporting it. *It is contrary to the fundamental principle of the stockholders and is condemned by the plainest dictates of sound policy. To allow the directors to exercise such a power would be a fruitful source of unfairness, mismanagement and corruption.* It is for these reasons that a shareholder can not be allowed to withdraw from the corporation with his proportionate amount of capital either by a release and cancellation before the shares have been paid up or by a purchase of the shares with the company's funds.”

In *Thompson v. Reno Savings Bank*, 7 Pac. 68, decided by the Nevada Court, the articles of incorporation fixed the capital of the bank at \$100,000.00 but it was agreed between the stockholders that only thirty per cent of the stock need be paid in. One Lake was a stockholder and upon the failure of the bank,

suit was brought against him by the receiver for the remaining seventy per cent due on his stock. He interposed this agreement as a defense. The court, after holding that the capital stock of a corporation, organized under the laws of the state for the purpose of banking, is the amount paid or promised to be paid for the purpose of incorporation, and it is a "fixed sum, not to be increased or diminished, except in the mode permitted by the statute," characterizes such an arrangement as one "made in defiance of the statute under which the bank was incorporated," and then quotes section 3543 of the Compiled Laws, as follows:

" It shall not be lawful for the directors to divide, withdraw or in any way pay to the stockholders or any of them, any part of the capital stock, nor to reduce the amount of the same."

The decision last cited ought to settle this litigation in favor of appellant. It is a decision of the Nevada Supreme Court construing the identical law under which the corporation for which appellant is Receiver was organized. The transaction amounted to a division of the capital among the stockholders in the case at bar. Nevada is the parent state of this corporation and in construing its statutes the decisions of its Supreme Court are controlling. (*Fairfield v. County of Gallatin*, 100 U. S. 50). When a person becomes a member of a corporation organized under the laws of another state, he consents to be governed by the general corporation laws of that

state and his rights and liabilities are tested and determined by such laws. (*Giesen v. London etc. Co.*, 102 Fed. 584, 42 C. C. A. 515; *Silver Mines v. Brown*, 58 Fed. 644, 7 C. C. A. 412; *Relfe v. Rundle*, 103 U. S. 222, 26 L. ed. 337; *Railway Co. v. Gebbard*, 109 U. S. 527.) In the Nevada case, above cited, there was an agreement to surrender a part of the capital agreed to be paid, which was condemned. In the case at bar, there was surrendered a part of the active capital—the very corpus of the bank—and it for more cogent reasons should not be tolerated.

In the case of *Smith Lumber Company*, 132 Fed. 618, heretofore referred to, the court said:

“ In the United States, I take it, the weight of authority upholds the right of a corporation, *in the absence of a statutory prohibition*, to become the purchaser of shares of its own stock; *but the courts which have most distinctly announced and upheld this doctrine have most definitely held to and rigidly enforced the collateral principle that a corporation can not become such purchaser when it results in a fraud upon the rights of, or injury or loss to, the creditors of the corporation.* The danger of fraud being perpetrated upon, or injury or loss resulting to the creditors was one of the potent reasons moving the courts of England to establish and adhere to the rule that a corporation can not become the purchaser of its own shares. In view of the contrary doctrine obtaining in most of the courts of this country, the safety of the creditors of the corporation lies in the recognition and enforcement of the *collateral principle* above set forth.

Were it not for the existence of this principle, creditors of corporations would occupy a most hazardous and precarious position."

In *Lowe v. Pioneer Threshing Company*, 70 Fed. 646, the United States Circuit Court for the District of Minnesota allowed an injunction against carrying out a resolution adopted at a stockholders' meeting to purchase the stock of certain stockholders by the corporation by transferring certain property and assets of the corporation therefor, where to do so would be in fraud of the rights of the minority protesting stockholders, even though the tendency in Minnesota was to permit the purchase of its stock by a corporation in the absence of charter prohibition or statute forbidding it, at least if made out of the profits derived from the business of the corporation.

In *Tolman v. N. M. & D. Mica Company*, (Dak.) 22 N. W. 505, a contract for the repurchase of shares of stock was held to be in violation of the laws of Colorado under which the corporation was organized, which laws forbid corporations to use any of their funds for the purchase of stock in their own company or corporation except such as may be forfeited for non-payment of assessments. In this case it was alleged that the contract of repurchase was made in pursuance and fulfillment of a contract previously made by the company for the purchase from plaintiff's assignor of his interest in a certain Mica mine, a part of the consideration for which purchase being said shares of stock so contracted to be repurchased. It was held that the contract was illegal.

In *Vercoutre v. Golden State Land Company*, (Cal.) 48 Pac. 375, the defendant company had a by-law to the effect that a stockholder desiring to surrender his stock and withdraw from the corporation might do so upon giving the required notice and thereupon on surrender of his stock be entitled to receive from the corporation the surrender value thereof. The Fairbanks Banking Company had a very similar by-law (F. 42). Vercoutre sought to surrender his stock under this by-law and the court said:

“ The further finding that article 16 of the by-laws aforesaid was illegal and void necessarily followed. Inasmuch as under the provisions of sections 301 and 354, Civil Code, the corporation can adopt only such laws as are not inconsistent with the constitution or existing laws of this state, it follows that any regulation or rule that it may adopt under the form of a by-law which contravenes the provisions of an existing law is invalid and has none of the elements of a by-law.

“ Section 309 of the Civil Code forbids the withdrawal or payment to the stockholders of any part of the capital stock of a corporation except upon its dissolution, or at the expiration of its term of existence.”

In *Kassler v. Kyle*, (Col.) 65 Pac. 34, the stockholders adopted a resolution reducing the amount of the capital stock in a bank one-half and providing that certificates of deposit should issue to the stockholders in payment for the stock surrendered by them. The court said:

“ Independently of statute, except in the instance thereby expressly permitted, banking corporations are inhibited from purchasing their own stock. To the stockholders of bank stock certain liabilities attach in favor of the general creditors. If a bank may purchase its own stock, this liability can be avoided, its capital depleted and there would be no security to the depositors except in the bank itself.”

In each of the foregoing cases the transactions herein complained of are unqualifiedly denounced as illegal just as the lower court declared them to be in the case at bar. They were illegal because prohibited by statute as well as because they contravene public policy. In the case at bar, they are found by the court to violate the laws of Nevada. Ought not, then, the directors with whose approval and under whose direction these illegal acts were done be held liable for such wrongful diversion of funds? If these purchases had been made out of surplus or undivided profits they would have been no less illegal, but injury to creditors might not have resulted. This bank was in a state of insolvency from its inception. Within four months a f t e r it commenced business it purchased Wood's stock and paid him \$13,000 therefor, and there were then no profits or surplus against which the same could be charged. Frequent and continuous purchases were made, in all aggregating \$56,000 down to within two months and a half of the time the bank ceased to do business, and, as found by the court, the bank had no surplus or undivided prof-

its against which any of the same could be charged. It must therefore have been in a continuous state of insolvency.

In further support of the principle that a corporation can not buy its own shares of stock where prohibited by statute, or where it has neither surplus nor undivided profits against which the same can be charged, see:

- Martin v. Zellerbach*, 38 Cal. 307;
- First Nat. Bank v. Salem etc. Co.*, 39 Fed. 89, 95-97;
- Commissioner v. Thayer*, 94 U. S. 631, 643, 24 L. ed. 133;
- Bank v. Lanier*, 11 Wall. 369, 20 L. ed. 172;
- Hall v. Alabama etc. Co.*, 143 Ala. 468, 39 So. 285;
- Currier v. Slate Co.*, 56 N. H. 262;
- Hamor v. Taylor, Rice Eng. Co.*, 84 Fed. 187;
- Farrington v. Tennessee*, 95 U. S. 679, 686;
- In re Brocking Mfg. Co.*, (Me.) 35 Atl. 1012;
- Tait v. Pigott*, (Wash.) 80 Pac. 172;
- Adams & Westlake Co. v. Deyette*, 5 S. D. 418, 425, 8 S. D. 127;
- German Sav. Bank v. Wulfekuhler*, 19 Kan. 60;
- Hall v. Henderson*, 126 Ala. 449, 28 So. 531;
- Crandall v. Lincoln*, 52 Conn. 73;
- Com. Nat. Bank v. Burch*, 141 Ill. 519, 32 N. E. 420;

Clapp v. Peterson, 104 Ill. 26;
Bank v. Ross, 68 Conn. 29;
Rogers v. Ogden etc., 30 Utah 188;
New Eng. Tr. Co. v. Abbott, 162 Mass. 148;
Blalock v. Kernerville Mfg. Co., 110 N. C.
99;
Van Brocklin v. Queen etc. Co., 19 Wash.
552;
Green v. Hedenberg, (Ill.) 42 N. E. 851.

The lower court undertook to excuse the directors from liability on the Strandberg transaction because said surrender was made in payment of a pre-existing debt, and from liability on the McGinn transaction because thereby the bank was being relieved of a dissatisfied and annoying stockholder; but the laws of the State of Nevada did not permit a bank to buy back its own shares for such reasons; otherwise the court could not have found that the transactions were in violation of said law.

On the trial below, reliance was had upon the cases of *In re Castle Braid Co.*, 145 Fed. 224; *Copper Bell Mining Company v. Costello*, (Ariz.) 95 Pac. 94, and *Barto v. Nix*, (Wash.) 46 Pac. 1033; but neither of these cases sustain the position of the lower court. In the *Castle Braid Company* case the contract of purchase was made with the assent of all the stockholders and it did not appear that the corporation was insolvent at the time. Nor was the purchase considered by the court to be prohibited by the Statutes of New York. In that case the court said:

“ The purchase of stock of the corporation by the corporation from the stockholders is not prohibited or forbidden, *but payment therefor from the capital may be and probably is.*”

In the *Copper Bell Mining Company* case, *supra*, Costello brought an action in Arizona to foreclose two mortgages on property of the corporation. The *Copper Bell Mining Company* was originally incorporated under the laws of the State of West Virginia. Subsequently a new corporation bearing the same name was organized under the laws of Arizona which took over the West Virginia corporation. It appears that one Gleeson was the owner of 8000 shares, being a small amount of the stock of the corporation, and was its superintendent and manager. His management of the company was believed to be injurious, and in order to get rid of him the officers of the company on behalf of the company purchased his stock. In order to make a part cash payment they borrowed \$15,100 from Costello secured by a first mortgage on the property of the corporation and executed to Gleeson a second mortgage thereon for the balance of the purchase price, which mortgage he assigned to Costello. In defense the corporation pleaded, among other things, that its act in executing the mortgage was *ultra vires* and that at said time the corporation was insolvent. The court said (95 Pac. 98):

“ In this country, while some states forbid it, the better rule seems to be that *in the absence of statutory requirement and where there is no*

*statutory liability on the stock, a solvent corporation may in good faith purchase its own stock subject to the rights of creditors upon a showing that they have been injured thereby, and in some instances of non-assenting stockholders, to have such purchase declared illegal. In the case before us we think the purchase by the company of its stock was a valid one as against the corporation. It was done in the discretion of the officers of the company in good faith, and in the exercise of their control of the affairs of the company for the purpose of getting rid of a superintendent, the owner of a small amount of stock, whose management of the company was believed to be injurious. At the time of the purchase there is no evidence that the company was insolvent, or that any of the officers or directors of the company, or any of its stockholders, had any reason to so believe, or that Costello or Reilly had any knowledge of the subject whatever. * * * In this case no proof was offered of any statute of West Virginia on the subject, and no Arizona statute prohibits such purchase. In the absence of any statute prohibiting the purchase by a corporation of its own stock, such purchase is a transaction not per se void; but its validity depends upon the circumstances of the case. The transaction might in some instances be avoided by stockholders who did not assent, if injured. It might be avoided by creditors who were injured. But there are no such facts in the record before us of the condition of the company at the time when the purchase of this stock was made as would warrant us in declaring the purchase illegal at the instance of the corporation."*

Subsequently the same case came up again before the court and the court said (100 Pac. 807, 810) :

“ We are clearly of the opinion that a purchase by the West Virginia Company of its own stock made with Costello's knowledge could not be upheld if existing creditors were in fact injured thereby. The difficulty with the appellant's position is that the record does not bear him out in his assumption that the creditors were injured by such purchase. The trial court found that at the time of the execution of the notes and mortgages the West Virginia Company had assets largely in excess of its indebtedness.”

In each of the last two cases, the court was particular to point out the absence of any statute forbidding the purchase as well as the fact that the corporation had assets in excess of its indebtedness and that it resulted in no loss to creditors. In the case at bar, the laws of Nevada prohibited the purchases and the same were made out of the bank's capital and resulted in loss to the creditors.

In *Barto v. Nix, supra*, after the bank had purchased the stock, it re-issued it to defendants. Suit was brought by the Receiver to collect an assessment upon the stock, and defendants contended that the bank had no authority to take back the stock and re-issue it. While the court intimated that a corporation had authority to take back its stock in payment of the indebtedness of one of its stockholders, this was only said by way of argument in answer to defend-

ants' contention. The whole matter was finally disposed of by saying:

“ But, whether it did or did not (have such authority), these defendants, who were the managers of the bank, cannot defend upon the ground that what was done was not authorized by the law.” (46 Pac. 1034.)

It will be seen that the Washington Court did not consider it essential to its decision whether or not a bank could take back its stock in payment of a debt due from its stockholders.

For other stock purchases made by the bank, aggregating \$21,000, the lower court entered judgment against the officers and directors participating therein (Decree, R. 200-202). All purchases were condemned by the court as illegal, wrongful and in violation of law, and recovery for all should have been included in the Decree.

These appellees purchased for the bank shares of its own stock and made payment therefor out of the capital of the bank and the money of the depositors. The laws of the State of Nevada prohibited such transactions. Their acts were illegal, a plain maladministration of the affairs of the bank. There is no room here for quibble over degrees and kinds of negligence for which directors are liable. Illegal acts amount in law to gross negligence and fraud, and the directors are liable for all losses occasioned thereby. Every illegal act is a breach of duty. Neither is there

any ground for quibble over the rights of creditors or stockholders as individuals to sue the officers of a corporation. This action is brought by the Receiver of the bank. Without doubt the bank could have sued its faithless officers for these acts, and any remedy which the bank might have the Receiver has and may enforce as an asset of the bank in his hands. (Zane on Banks and Banking, Sec. ¹¹²86; *Coddington v. Canada*, (Ind.) 61 N. E. 567.) ★ Nor will good faith excuse them for losses arising out of their own neglect of duty. They knew that these purchases were being made. They acquiesced in all of them. In many cases they were made under their direction and with their express approval. The courts are asked to go too far when they are asked to exempt from liability for resulting damages one who acts illegally, or to tolerate a conscious breach of positive duty because one claims to so act in good faith. The statute makes no such exception to its prohibition. In *Bank v. Lanier*, 11 Wall. 369, 20 L. ed. 172, no doubt the bank officers acted in good faith when in violation of the currency act they accepted the stock of the bank as security for a loan; but the court nevertheless said such act was illegal. Nor does the criterion of reasonable care apply where the officers of a corporation are acting in excess of their power. If they knowingly exceed their authority and thereby inflict a loss upon the corporation, what they did is not open to the test of reasonable care or good faith; but their liability follows as

funds of the bank in *ultra vires* and forbidden enterprises. These propositions are sustained by the following authorities:

1 Michie on Banks & Banking, pages 341, 342;

Cooper v. Hill, 36 C. C. A. 402;

Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662;

Trustees v. Bossieux, 3 Fed. 817;

Thompson v. Greeley, 107 Mo. 577, 591-2;

Marshall v. Farmers & Mechanics Sav. Bank, (Va.) 8 S. E. 586, 2 L. R. A. 534;

Oakland Bank v. Wilcox, 60 Cal. 126;

Stone v. Rottman, 183 Mo. 552, 82 S. W. 76, 83-84;

In re Brocking Mfg. Co., (Me.) 35 Atl. 1012;

Green v. Hedenberg, (Ill.) 42 N. E. 851;

Boswell v. Allen, 168 N. Y. 157, 55 L. R. A. 751;

U. S. v. Britton, 108 U. S. 199, 27 L. ed. 698;

Evans v. U. S., 153 U. S. 584, 38 L. ed. 830;

German Sav. Bank v. Wulfekuhler, 19 Kan. 60;

Boyd v. Schneider, 65 C. C. A. 209, 131 Fed. 223;

Coddington v. Canaday, (Ind.) 61 N. E. 567.

In Michie on Banks & Banking, pages 341-2, it is said:

“ Where a statute prohibits the doing of an act, or imposes a duty for the benefit and protection of individuals, persons who disobey the prohibition or neglect to perform the duty render themselves liable to those for whose protection the statute was enacted for any damage or loss proximately resulting from such disobedience or neglect. Restrictions contained in statutes regulating the business of banking are, generally, of this character, and for violations of the charter or general statutes, directors may render themselves personally responsible to creditors and depositors who sustain loss thereby; as, for example, for waste of corporate funds and property by loaning money without security in cases where security is required to be taken, or investing the money of the bank in speculative enterprises forbidden by law, or accepting securities in payment of subscriptions to the capital stock when it is required by law that such payments shall be in cash, *or who otherwise commit violations of the charter or general law whereby the money or property of the corporation is lost or wasted.* * * * *Where fraud or culpable negligence is shown, the directors can not excuse themselves by pleading mere honesty of intention. Good faith alone will not excuse them where there has been that lack of care, attention, and circumspection in their management of the affairs of the corporation which is exacted of them as quasi-trustees.*”

In *Briggs v. Spaulding*, *supra*, it is said:

“ Our attention has not been called, however, to any duty specifically imposed upon the direct-

ors as individuals by the terms of the act, *although if any director participated in or assented to any violation of the law by the board he would be individually liable.* * * *

“ In any view the degree of care to which these defendants were bound is that which ordinarily prudent and diligent men would exercise under similar circumstances, and, in determining that, the *restrictions of the statute* and the usage of business should be taken into account.”

In *Trustees v. Bossieux*, *supra*, and in *Stone v. Rottman*, *supra*, illegal acts of directors in paying dividends out of capital, or in permitting illegal overdrafts and investing the funds of a bank in prohibited enterprises, were treated as amounting to gross negligence for which directors were liable. In the case last referred to, the Missouri Supreme Court, approving the conclusions of the referee, said:

“ While the referee finds that the investment of the bank in the coal business and the carrying on of that business was illegal, and as far as those acts were concerned were intentional, yet he does not find that the injury resulting from such acts was intentional and wilful, but simply the result of negligence. In other words, the finding, in effect, is that there was no dishonesty practiced in the transaction with the coal company, but that permitting the overdrafts, in view of the surrounding conditions of the coal company was in fact gross negligence. The referee, in his conclusions, finds that the pleadings were sufficient to support a judgment, and he says that ‘the investment of the money in this coal

business was illegal. The money drawn by the coal company took the shape of overdrafts. The pleadings allege that the defendants negligently permitted these overdrafts. The fact that the overdrafts were illegal is consistent with and tends to sustain the allegation that the defendants were negligently permitting them'."

In *Cooper v. Hill*, *supra*, a case arising under the National Bank Act, it is said (p. 407) :

" The Statutes of the United States are the measure of the powers of national banks, and these corporations can lawfully exercise none but those there expressly granted, and those fairly incidental thereto. * * * The officers of banks are bound to know and they are charged by the law with the knowledge of the extent and limitations of the powers of the corporations for which they act, and of their own authority as the agents of these corporations. It is said that they are not technically trustees of *express* trusts, but they are the agents of the bank, charged, under the national banking laws, with an implied trust to use the funds of the bank for the purposes specified in these laws, only, and to preserve them for their creditors and stockholders. *Every agent incurs a personal liability to his principal for losses occasioned by his unauthorized acts under the general law, and the officers of corporations are no exceptions to the rule. Upon this principle the directors and other officers of a national bank become personally liable to the bank and its successor in interest, its receiver, for losses caused by their use of its funds for unauthorized purposes, as well as for culpable negligence in their use and for their fraudulent appropriations.*"

In *Oakland Bank of Savings v. Wilcox*, *supra*, the California court, holding the officers of a bank liable for losses sustained on account of loans made in violation of a provision of its by-laws, said (p. 140) :

“ In this case neither the president nor the cashier had any authority to permit an account to be overdrawn. To make an overdraft was a fraud in law on the part of the drawer ; to pay or authorize the payment was a fraud in law on the part of the officers paying or authorizing the payment. The money of the stockholders was invested, and of the depositors was deposited, to the end that the business should be managed as the by-laws should prescribe ; those by-laws forbid loans to be made without the approbation of the finance committee ; and when the president or cashier went beyond that, and loaned upon his or their own judgment, *a violation of duty occurred.*”

In *Thompson v. Greeley*, *supra*, the Supreme Court of Missouri, holding the directors of a bank liable to the Receiver for losses sustained because of illegal loans made, said (pp. 591-2) :

“ It is true the statute imposes no penalty or liability on either the corporation or its directors for the violation of its provisions, and an action, therefore, must be at common law for breach of duty. *But every violation of law is a breach of duty.* It has been seen that the directors are responsible to the corporation they undertake to manage for all losses occasioned by any flagrant breach of their duty. Whether that

duty required good faith and honesty in the administration of the affairs of the corporation as is imposed at common law, or whether it was a duty enjoined or an act prohibited by statute, could make no difference as far as the doing or omitting them might affect their liability.

“ The liability rests upon the common law rule which ‘renders every agent liable who violates his authority to the damage of his principal.’ 1 Morawetz on Priv. Corp., Sec. 556. The statute fixed the authority of the directors in respect to the amount in which any person, firm or corporation might become indebted to the bank, and if they wilfully and knowingly permitted the Anchor Milling Company to become indebted to it to a greater amount than was authorized by the statute, and loss to the bank resulted therefrom, they are, and in right should be, liable for such losses. * * * *The wilful violation of the statute and consequent loss therefrom, furnish sufficient proof of liability.*”

While the case last cited was an action at law, nevertheless the court recognized that the same principles would apply where the action was properly cognizable in equity.

It may be contended that the by-laws of the bank (F. 42) impliedly authorized the purchase of its stock by the bank. But it has been held by the Nevada court and other courts that if the by-laws of a corporation are in conflict with the statutes of the state such by-laws are void.

—*State ex rel Corey v. Curtis*, 9 Nev. 325;

Herring v. Ruskin Co-op. Ass'n, (Tenn.)
52 S. W. 327;

Vercoutre v. Golden State Land Co., (Cal.)
48 Pac. 375;

Cooper v. Hill, 36 C. C. A. 402, 407.

In construing the constitution and statutes of another state, the decisions of the Supreme Court of that state are controlling.

—*Fairfield v. County of Gallatin*, 100 U. S.
50;

Consumer Gas Trust Co. v. Quimby, 137
Fed. 882, 70 C. C. A. 220.

When a person becomes a member of a corporation organized under the laws of another state, he consents to be governed by the general incorporation laws of that state and his rights and liabilities are tested and determined by such laws.

—*Giesen v. London etc. Mtg. Co.*, 102 Fed.
584, 42 C. C. A. 515;

Relfe v. Rundle, 103 U. S. 222, 226, 26 L.
ed. 337;

Railway Co. v. Gebbard, 109 U. S. 527;

Silver Mines v. Brown, 58 Fed. 644, 7 C. C.
A. 412.

It is respectfully submitted that judgment should be entered in this court, on the facts found by the lower court, in favor of appellant and against the appellees, John A. Jesson, James W. Hill and E. R. Peoples, for \$12,000 for the purchase of stock from

the Strandbergs and Johnson, and against the appellees, John A. Jesson, Ray Brumbaugh, John A. Clark, J. A. Healey and George Preston, for the purchase of the McGinn stock.

II.

The Purchase of Wood's Stock.

APPELLANT IS ENTITLED TO JUDGMENT AGAINST APPELLEES JOHN A. JESSON, JAMES W. HILL AND R. C. WOOD JOINTLY AND SEVERALLY FOR THE PURCHASE BY THE BANK OF THE STOCK OF SAID WOOD.

The facts are found in detail by the court and without repeating the various Findings thereon, which are copied in full in the forepart of this brief, the court is respectfully referred to Findings Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 26, 27, 28, 29, 30, 31, 32, 33, 34, 38, 41, 42, 51, 52, 53, 54, 57, *supra*.

The transaction now under consideration differs from those stock purchases heretofore considered in that it was the claim of the appellees in their respective answers that in the organization of such corporation Wood never became either a subscriber to stock or a stockholder therein, and that he consented to the transfer of his share of the partnership assets to the corporation with the understanding that he

should have the option to take either cash or stock therefor and that within the period of such option he elected to take cash, as the result of which election the \$13,000 in controversy was paid to him. But the court found these contentions against appellees, and on those findings this matter must be disposed of.

In substance the court found that prior to January 21, 1908, subscriptions for the capital stock of said corporation were circulated and "the name of R. C. Wood was subscribed thereto" by his partner E. T. Barnette (F. 3); that on March 12, 1908, at a meeting of the subscribers to stock held immediately after the receipt of the articles of incorporation, Wood was "declared to be a stockholder of said corporation" (F. 13); that on said March 12, 1908, at a meeting of the Board of Directors it was ordered "that stock issue to said Barnette, Hill and Wood in exchange for the property received from them by said corporation as follows: * * * Wood 220 shares" (F. 14); that on March 16, 1908, a written agreement signed by Barnette and Hill was entered into between the corporation and said partners fixing the value of the resources of the partnership to be transferred to, and the amount of liabilities to be assumed by, the corporation, and fixing the amount of stock to be issued to Wood at 130 shares, "in which said agreement the said Barnette, Hill and Wood agreed to accept stock of the corporation at its par value for the amount of assets in excess of said liabilities" (F. 15); that at the time said written agreement was

signed and during the negotiations leading up to the making of the same Wood was in Seattle "but he was advised fully concerning the same by the defendant Hill by letter and telegram" (F. 19); that prior to the return of Wood to Fairbanks, he "offered to sell his stock in the corporation and to take in payment therefor part cash and a note for the balance, to be secured by said stock as collateral security" (F. 20); that when Wood returned to Fairbanks in April, 1908, "he signed said written agreement so entered into as aforesaid, knowing that the same contained said clause requiring him to take stock for his share of the assets of said partnership so transferred to said corporation in excess of the liabilities thereof" (F. 21); that Wood was elected cashier of the corporation bank on March 12, 1908, and immediately notified thereof (F. 26); that Wood accepted said office of cashier and on March 16, 1908, entered upon the discharge of the duties thereof, and on his return to Fairbanks in April, 1908, entered actively upon such duties and continued so to act until June 29th, 1908, when he tendered his resignation to be effective at the close of business on June 30, 1908 (F. 27), at which time he demanded that there be paid to him \$13,000 as the amount of his interest in the partnership assets (F. 38); that a certificate for 130 shares of the capital stock of said corporation bank was written up in the name of defendant Wood of the par value of \$13,000 which was never detached from the stock book but was "carried on the books of the bank as outstanding stock from March 16, 1908, to June

30, 1908" (F. 29) ; that on June 30, 1908, a certificate of deposit "with the approval of the officers and directors of said bank," was issued to and accepted by Wood in the sum of \$13,000 "in lieu of said stock," which certificate was signed by the assistant cashier prior to the time said resignation of Wood became effective, "and said shares of capital stock were on the same day charged to treasury stock on the books of said bank" (F. 30) ; that subsequently Wood "drew out in cash from the funds of said bank" the amount of said certificate of deposit, \$13,000 (F. 31).

The court further found generally respecting all the purchases of stock by said bank as follows :

LI.

" That when stock was so taken back by the corporation, the amount paid therefor was either paid in cash or notes held by the bank were cancelled and surrendered to the stockholders.

" That said bank had no surplus or undivided profits against which the same could be charged."

LII.

" That the taking back of said stock and the payment therefor as aforesaid was illegal, wrongful, and in violation of the laws of the State of Nevada under which said corporation was organized."

LIV.

" That said stock surrenders so made as aforesaid were acquiesced in by said directors, and in some instances were made under their directions and with their express approval."

On these Findings of Fact, the court concluded as a matter of law that the appellees Jesson, Hill and Wood were not liable to appellant for the purchase of said \$13,000 worth of stock, and dismissed appellant's action therefor (C. of L. 8, R. 199; Decree 9, R. 203). Appellant proposed Conclusion of Law No. 1 allowing him recovery against said appellees for said item (R. 204-5), which was denied. Appellant excepted to the denial of said proposed Conclusion of Law No. 1 (R. 218, Ex. 3) and particularly excepted to the denial of that portion of the same which related to said item (R. 220, Ex. 8). Appellant also excepted to said dismissal (R. 220, 221; Ex. 12, 13, 14). The above matters are assigned as error in Assignments of Error Nos. 3, 8, 12, 14, 21 (R. 229-234).

From the foregoing facts found by the court there is no escape from the conclusion that Wood subscribed for the capital stock of said corporation bank; that he was accepted as such stockholder by the other subscribers; that he was recognized by the directors as such stockholder; that he acknowledged himself to be such stockholder by his acts and conduct; that stock was issued to him and carried on the books of the bank, during all the time he was cashier, as outstanding stock; and that with the approval of the officers and directors of said bank and at a time when the bank had neither surplus nor undivided profits said stock was wrongfully and illegally purchased by the bank, which amounted to a division of the capital of the bank among the stockholders or else a payment

therefor out of the money of its depositors. At the time said stock was purchased and paid for, the defendant Jesson was a member of the board of directors, and the defendant Wood was its cashier and a member of its executive committee (F. 34). The executive committee had the same powers as the board of directors subject to approval by said board (F. 18).

In this transaction, there is no claim that Wood's stock was purchased in satisfaction of a pre-existing indebtedness or to be relieved of an annoying and dissatisfied stockholder. None of the exceptions to the rule forbidding a corporation to purchase its own stock have any application here. It falls clearly within the general prohibition of the law.

At the trial below, it was urged that recovery could not be had on account of this transaction because it grew out of those matters connected with the taking over by the corporation of the affairs of the former partnership, which contract had been fully executed and could not in this action be now rescinded. The fallacy of that contention is two-fold: *First*, the taking back of Wood's stock does not arise out of such contract. He elected, as found by the court, to take this stock for his alleged share of the partnership assets, and became a stockholder in the corporation. That completed the transaction involved in said contract. Everything happening afterwards was a new deal for the taking back of said stock. *Second*, this is not an action for rescission of such

contract, but one for damages against the officers or agents of the bank for their misconduct and maladministration of the affairs of the bank. It is not an action brought by one of the parties to the contract against the other parties thereto; but is an action by the bank against the officers and agents for what they did in such capacity. True, Wood and Hill were also parties to said contract; but they are sued herein as officers and agents of the bank and not as strangers to it. (Complaint, Pars. XIX, XXXVIII, R. 21-24-42.) If the principle of rescission of executed contracts were to be applied to this action, then it would follow of necessity that a principal could never maintain an action against his agent for misconduct or breach of trust. His only remedy would be to discover and intercept the act before its completion. The bank would be remediless even in cases of embezzlement by its officers.

The same authorities heretofore discussed when considering the purchase of the McGinn and Strandberg stock are applicable to the purchase of Wood's stock, and to them reference is now respectfully made. Under these decisions the officers and directors now before the court, namely, Hill, Jesson and Wood, who participated in such purchase, are unquestionably liable.

In addition to the reason supported by the foregoing authorities for holding appellees liable for this transaction the attention of the court is invited to the fact that this transaction in itself amounted to a

fraud. Included in the assets transferred by said partnership to the corporation bank and accepted by it at their face value were certain notes then past due and still remaining in the hands of the Receiver "unpaid and uncollectible," amounting to \$69,908.94 (F. 22). It appears (F. 14 and 15) that, by the terms of the written contract between the partnership and the corporation bank, the assets of said partnership so transferred to and accepted by it were valued at \$790,940.31 and the agreed liabilities of the partnership were \$538,940.31. This left an apparent excess of assets over liabilities of \$252,000 which belonged to the three partners, of which amount the partners agreed to take \$52,000 in stock of the corporation, one-fourth of which belonged to Wood. The remaining \$200,000 belonged to Barnette as capital invested in the partnership. The amount coming to Wood under this arrangement was \$13,000, for which the stock in question was issued to him. It will thus be seen that Wood's stock was issued in consideration of property transferred by the partnership to the corporation, included in which was said \$69,908.94 of worthless notes, which would completely wipe out the consideration for said \$52,000 worth of stock. Each of these appellees had full knowledge that said notes were past due at the time of said transfer (F. 57). Included in said past due paper were two notes of the Tanana Electric Company aggregating \$27,997.38 which at the time of said transfer were known to be utterly worthless (F. 23 and 24), and also included in said past due paper was paper of the face

value of \$22,979.99 which, prior to said transfer, had been charged *on the books of said partnership* to a doubtful account, of which notes so charged to said doubtful account \$12,860.61 “remains unpaid and uncollectible” (F. 35). These last two items of loss, arising out of the transfer and acceptance of said past due paper, alone amount to \$40,857.99 excluding interest, one-fourth of which, or \$10,214.50, unquestionably should have been deducted from the credit of \$13,000 allowed in payment of Wood’s stock.

In addition to this worthless paper there was transferred shares of the capital stock of the Gold Bar Lumber Company at a valuation of \$341,949.00, which was clearly an overvaluation thereof (F. 25, 40); and the partners were subsequently allowed and paid \$39,642.81 as accrued interest on the loans and discounts so transferred. This last matter is considered in another portion of this brief.

The court found that these appellees, Hill, Wood and Jesson, were officers and directors of the corporation bank at the time the written agreement for the issuance of said stock in exchange for said partnership assets and the acceptance of said past due notes at their face value, was entered into, confirmed and approved, and that said Hill and Wood were members of said partnership and “personally interested therein adversely to said corporation” and that they “acquiesced in said transaction and gave their consent thereto with full knowledge on the part of each of them of the facts heretofore found respecting said

transactions" (F. 57). To accept and pay for these Tanana Electric Company notes at their face value, knowing that they were worthless was a gross violation of duty on the part of these officers; exercise of the slightest care on their part would have saved the bank from any loss arising out of the paper which was then carried on the books of the partners as doubtful; exercise of ordinary care would have prevented them from accepting at full face value the entire amount of this worthless past due paper. These matters are considered in a subsequent subdivision of this brief. Only a fraudulent and wilful disregard of duty could have induced them, on June 30, 1908, three months after they had taken over these assets and had occasion to observe from actual experience their uncollectibility, to pay to Wood \$13,000 in cash for his stock purchased with them. They knew, or by the application of the slightest intelligence and diligence could have known that the bank had been defrauded by this former transaction; and, knowing that, they deliberately turned over the fruits of the fraud, to the extent of \$13,000, to a defrauding party. It would have become them with much better grace to have then stood on the completed and executed contract.

It may be well to call the court's attention at this time particularly to the fact that these appellees, Hill and Wood, who participated in the foregoing transaction as officers of the corporation, are the same Hill and Wood who were members of said partnership,

whose assets were transferred to and accepted by the corporation in payment of said stock. As members of the partnership they had full knowledge of the entire transaction, and, as officers of the corporation they, together with the appellee Jesson, who also had full knowledge of the facts in said transaction, acquiesced in the same and gave their consent thereto (F. 57). In the purchase of this stock by the bank, Wood had a direct personal interest which he safeguarded to the neglect of his duty as an official of said bank. More specific attention will be given to this point hereafter in considering the liability of the officers and directors for transactions arising out of the purchase of the partnership assets.

III.

The Purchase of Worthless Notes.

APPELLANT IS ENTITLED TO JUDGMENT AGAINST APPELLEES JOHN A. JESSON, JAMES W. HILL AND R. C. WOOD JOINTLY AND SEVERALLY FOR THE PURCHASE FROM THE PARTNERSHIP OF \$69,908.-94 OF PAST DUE AND WORTHLESS NOTES; PARTICULARLY THE TANANA ELECTRIC COMPANY NOTES AGGREGATING \$27,997.38, AND NOTES AGGREGATING \$12,860.61 WHICH THE PARTNERSHIP WAS CARRYING IN AN ACCOUNT KNOWN AS "DOUBTFUL ACCOUNT" AT THE TIME OF SAID PURCHASE.

The facts bearing upon this transaction are found in Findings 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14,

15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 35, 36, 38, 39, 40 and 57, *supra*.

This transaction arises out of the taking over of the affairs of the partnership by the corporation bank. According to the terms of the written agreement entered into between said partnership and said corporation, the corporation bank assumed the liabilities of the partnership, including an obligation of \$252,000 to the partners individually, in consideration of the transfer to it of the partnership assets. As a part of these assets were certain specified loans and discounts, and included in this item were \$69,908.94 of paper then past due which the corporation accepted at face value, and which the court found is still in the hands of the Receiver "unpaid and uncollectible" (F. 22). The above named Hill and Wood, appellees herein, together with one Barnette composed said partnership, and, upon the organization of the corporation bank, Barnette became its president, Hill its vice-president and member of its executive committee, and Wood its cashier, and they were such officers of the corporation when said written agreement was entered into. The appellee Jesson was at said time a member of the board of directors of the corporation.

Included in said past due paper were two notes of the Tanana Electric Company, as to which the court made the following findings of fact:

XXIII.

" That of said notes so past due as aforesaid,

there were two executed by the Tanana Electric Company in the sum of \$27,997.38 which depended for their value upon the existence of an alleged guaranty of the Scandinavian-American Bank to make advancements sufficient to cover the same; that said alleged guaranty never had any existence in fact, and the claim therefor had been repudiated by said Scandinavian-American Bank prior to the time said note was accepted by said board of directors, *and said repudiation was known to the members of said board.* That said notes are still unpaid, and the same was at all times carried on the books of the said Washington-Alaska Bank, formerly Fairbanks Banking Company, as an asset in the sum of \$27,997.38."

XXIV.

" That said board of directors and the officers of said bank accepted said notes of the Tanana Electric Company and paid therefor the sum of \$27,997.38, *with knowledge on the part of each of them that the same depended for their value upon said alleged guarantee alone.*"

In the matter of the "doubtful account" notes which were included in said past due paper, the court found:

XXXV.

" That of the notes accepted from said partnership as aforesaid and paid for by said corporation, there were charged on December 31, 1907, by said partnership on the books of said partnership to an account known as 'doubtful account' the sum of \$22,979.99 and said doubtful a c c o u n t, so including said notes in said amount, was then depreciated on the said books

to the amount of thirty-three and one-third per cent thereof, which said notes were accepted by said corporation and paid for by them in the amount aforesaid, to-wit, \$22,979.99, all of which said notes were then past due, and of which there still remains unpaid and uncollectible the sum of \$12,860.61. That of said notes so charged to said doubtful account as aforesaid, there was on December 31, 1909, charged by said corporation to the account of profit and loss on the books of said corporation the sum of \$12,-192.80."

LVII.

" * * * That at the time the aforesaid resolution was adopted by the said board of directors to take over the business and affairs of said partnership; * * * and at the time said past due notes held by said partners were accepted and paid for by said corporation, including said notes of the said Tanana Electric Company and said notes which had been charged to the doubtful account of said partnership as aforesaid; * * * the following defendants now before the court in this action were officers and directors of said corporation and acquiesced in said transactions and gave their consent thereto with full knowledge on the part of each of them of the existence of the facts heretofore found respecting said transactions, to-wit, James W. Hill, vice-president and member of its executive committee, John A. Jesson, member of its board of directors, R. C. Wood, its cashier. That the said Hill and Wood were also members of the partnership with which said corporation contracted respecting said matters *and were each personally interested therein adversely to said corporation.*"

On these Findings the court concluded as a matter of law that the appellees Jesson, Hill and Wood were not liable to appellant for the purchase of said notes, and dismissed appellant's action therefor (C. of L. 8, R. 199; Decree 9, R. 203). Appellant proposed Conclusion of Law No. 1 allowing him to recover against said appellees for said transaction (R. 204), which was denied. Appellant excepted to the denial of said proposed Conclusion of Law No. 1 (Ex. 3, R. 218) and particularly excepted to the denial of that portion of the same which related to said transaction (Ex. 5, 6, R. 219). Appellant also excepted to said dismissal (Ex. 12, 13, 14; R. 220, 221). The above matters are assigned as error in Assignments of Error Nos. 3, 4, 5, 12, 14, 17, 18 (R. 229, 231-233).

The exercise by the directors and officers of the slightest degree of diligence would have saved loss on this transaction so far as the notes of the Tanana Electric Company and the notes charged to "doubtful account" on the books of the partnership prior to the transfer to the corporation, are concerned. These items aggregate \$40,857.99. Appellees, Hill, Wood and Jesson acquiesced in the transaction with full knowledge of the facts, and Hill and Wood were personally interested therein adversely to the corporation whose interests it was their duty as officers to protect. There is really no room for the application of any rule of diligence to this transaction. Diligence is only important in determining whether or not the officers knew or could have known of any infirmity

in the paper. If they knew of such infirmity, and the court has found that they did so know, then there is no question of loss through failure to use due care to avoid it. This was wilful and fraudulent misconduct on their part, if not downright criminality. One can not purchase property known to him to be worthless, and then be heard to say that he carefully guarded against loss. Particularly is this true as to Hill and Wood who had a personal interest in the matter.

It was contended on the trial below that there could be no recovery on this transaction, nor for the payment to said partners of accrued interest on said loans and discounts next considered in this brief, for the reason that each was a part of the contract for the taking over by the corporation of the partnership assets, which contract had been fully executed and could not be rescinded under the pleadings herein, if it could be at all. But again, appellant states that this is not an action for rescission of contract. It is an action to recover against faithless officers and agents of the bank such damages as the bank sustained on account of their actions. It is not a suit by one of the parties to the contract against the other party. If it were so, it would not have been proper or necessary to join as defendants all the officers and directors of the bank participating therein, but only those individuals who were members of the partnership. That this is not a suit for rescission of contract clearly appears from the complaint, especially Pars. IX and XXXVIII (R. 12-14, 42). It was also contended at the trial that the purchase of these notes

was authorized by the proposed incorporators. But, "As against the claims of creditors of an insolvent corporation, the directors cannot shield themselves from liability for gross mismanagement of its affairs by interposing a pretended authorization by the stockholder." (*Coddington v. Canaday*, (Ind.) 61 N. E. 567, 571.)

The law bearing generally upon the liability of officers and directors for misconduct such as that found by the court in the purchase of these worthless notes has been reflected in the cases heretofore cited and commented upon in this brief. The attention of the court, however, is respectfully invited to the following authorities dealing with transactions of the kind now particularly under consideration, namely:

Michie on Banks & Banking, pp. 267, 296-297, 367;

Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662;

Marshall v. F. & M. Sav. Bank, (Va.) 8 S. E. 586, 2 L. R. A. 534;

Ryan v. Ry. Co., 21 Kan. 365;

F. & M. Bank v. Downey, 53 Cal. 466;

Coddington v. Canaday, (Ind.) 61 N. E. 567;

Trustees v. Bossieux, 3 Fed. 817;

Bosworth v. Allen, (N. Y.) 61 N. E. 163;

Stearns v. Lawrence, 28 C. C. A. 66;

Koehler v. Hubby, 67 U. S. 717, 17 L. ed. 339;

Wilbur v. Lynde, 49 Cal. 290;

Kankakee Woolen Mills Co. v. Kampe, 38 Mo. App. 229;

Wardell v. Railroad Co., 103 U. S. 651, 26 L. ed. 509;

Bundy v. Jackson, 24 Fed. 628.

“ The directors of a corporation are its primary agents, and, in reference to corporate property act in the relation of trustees. The character of their relation requires of them the highest and most scrupulous good faith in their transactions for the corporation and the stockholders. The law does not permit them to manage the affairs of the corporation for their personal and private advantage, nor pecuniarily to be interested in contracts which other parties make with the corporation, through their influence and direction.”

—*Ryan v. Railway Co.*, 21 Kan. 365 (1st Syl.).

In Michie on Banks & Banking, pages 296-297, it is said:

“ Wherever in dealings between an officer or agent and his bank the element of the personal interest of such officer or agent enters, so that he occupies, as regards such personal interest, a position adverse to that of the bank, a situation has arisen calling for the exercise of that degree of fairness and good faith known as *uberriemae fidei*. In every such transaction his conduct will be examined with the closest scrutiny, and it is his duty to not only make full disclosures of all material facts within his knowledge, but if, in such transaction, he represents both the bank and his own interests, then it is plainly his duty,

as an officer of the bank, to execute his trust with an eye single to the interests of the bank, and, in case of conflict, to guard the interest of the bank even to the loss or destruction of his own. * * * The directors of a corporation hold a fiduciary relation to the stockholders, and have been intrusted by them with the management of the corporate property for the common benefit and advantage of each and every stockholder, and by their acceptance of this office they preclude themselves from doing any act, or engaging in any transaction, in which their private interest will conflict with the duty they owe to the stockholders, and from making any use of their power or of the corporate property for their own advantage. *It is against public policy to permit persons occupying fiduciary relations to be placed in such a position that the influence of selfish motives may be a temptation so great as to overpower their duty and lead to a betrayal of their trust, and the rule is unyielding that a trustee shall not, under any circumstances, be allowed to have any dealings in the trust property with himself, or acquire any interest therein. Courts will not permit any investigation into the fairness or unfairness of the transaction, or allow the trustee to show that the dealing was for the best interest of the beneficiary, but will set the transaction aside at the mere option of the cestui que trust. There is no limit to the variety of the circumstances under which cases illustrating these principles may arise.*"

Even the rule that directors and officers are bound to use that degree of care which ordinarily prudent and diligent men would exercise under similar circumstances ought to render them liable for ac-

cepting and paying for this entire lot of worthless past due paper aggregating \$69,908.94.

“ If they became acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of care certainly makes them liable.”

—*Briggs v. Spaulding, supra.*

Stearns v. Lawrence, supra, is a case very similar to this one as respects the taking of the Tanana Electric Company notes. Stearns was president of a bank and one Baker was its cashier. The bank held certain paper on which Baker was either endorser or the maker thereof. This paper, Stearns exchanged for a note owned by Baker and executed by Anderson & Griffen. This Anderson & Griffen note depended for its worth upon the extent of a certain guaranty respecting the quantity of timber the lands in purchase of which it was executed would produce. The amount of the note was to be reduced at the rate of \$3.50 for each thousand feet of lumber short of the guaranteed number of feet. Stearns purchased the note for the bank with full knowledge of such guaranty. The quantity of lumber on the land sold turned out to be below the number of feet guaranteed, and Anderson & Griffen enforced a credit against the bank for the deficiency. Afterwards the bank failed, and Lawrence as its receiver brought suit against Stearns for damages for alleged breach of trust and

negligence. Decree was entered in favor of the receiver. It was held (Syl. 3) :

“ The purchase of a note by the president and managing officer of a bank, for which he paid from its funds over \$20,000, with knowledge that it was burdened with a guaranty made by the payee, which might defeat its collection, is *such negligence as renders him liable to account to the bank or its creditors for any loss which resulted.*”

In *Bosworth v. Allen*, *supra*, the New York Court of Appeals said :

“ Equitable jurisdiction extends to all culpable acts and omissions of the directors by which the pecuniary interests of the corporation are or may be injured. If they are treacherous to its interests and appropriate its property or intentionally waste its assets, or take money for official action, or ‘sell out’ by resigning, and thus give control to others, they are liable to account in equity to the corporation or its representatives, not only for the money or property in their hands, but also for such as they fraudulently disposed of or wasted, as well as for the damages naturally resulting from their official misconduct and even as we have recently held, for money received by virtue of their office.”

Coddington v. Canaday, *supra*, is a very similar case to the one at bar. In that case a bank, known as the Citizens Bank, on the expiration of its charter, reorganized, taking over the affairs of the old bank. The defendants were directors in the old bank and,

upon such reorganization, became directors of the new bank. The new bank afterwards became insolvent and the Receiver brought suit against the directors for damages arising out of their negligence and inattention in the management of its affairs. The complaint among other things charged that in taking over the old bank, said directors took over for the new bank real estate at an excessive valuation and some worthless notes, drafts, checks, etc., at their face value in payment of stock subscriptions and carried them on the books of the new bank at such face value. As a partial defense to this charge of the complaint, it was set up that the new bank with the consent of its stockholders and acting upon reliable legal advice accepted the real estate, notes, judgments, etc., in payment of stock subscriptions and that, in the transfer of this property to it, agreed that it should be applied in discharge of all legal claims against the old bank; that the new bank accepted said property and proceeded to use, collect, sell and convert it to its own use. The agreement with the stockholders was in writing. In affirming the action of the lower court sustaining a demurrer to this defense the court said:

“Corporations, other than banking, may, perhaps, take property of certain kinds at reasonable valuation, and under circumstances entirely free from fraud, in payment of such subscriptions; but banks stand upon a different footing, and the reasons which justify such dealings in the one case do not apply in the other. But, even if notes, bills, judgments, and the like, could

be taken by the directors in payment of stock subscriptions, they could not lawfully be so taken unless there was reasonable ground for believing that they were good and collectible, and of the value at which they were to be received. If they were worthless, as charged in the complaint, it was the duty of the directors of the new bank to refuse to recognize them as payment for such stock subscriptions, and a failure to exercise ordinary care in accepting them in lieu of money was a breach of their duty as the agents of the corporation. Such a transaction was a deviation from the usual course of business, and it devolved on the appellants to show that the notes, bills, judgments, etc., so taken and recognized by them were of the value at which they were transferred or that they exercised ordinary care in ascertaining their value, and had reason to believe them to be worth the amounts for which they were taken. An agent authorized to sell the property of the principal, or to collect debts due to him, is guilty of a gross breach of his duty, if, instead of obtaining money, he carelessly receives worthless paper or securities.

“ But the appellants insist that the acceptance of the notes, bills, judgments, and real estate by the directors of the new bank in payment of stock subscriptions was expressly authorized by the stockholders, and therefore the receiver, who represents the stockholders, is estopped from asserting any claim against the directors on this account. If the stockholders alone are interested, the argument of the appellants on this question might deserve serious consideration. The complaint alleges that the corporation is insolvent. The receiver therefore represents the interests of the creditors of the bank, as well as those of the stockholders. *As against the*

claims of creditors of an insolvent corporation, the directors cannot shield themselves from liability for gross mismanagement of its affairs by interposing a pretended authorization for their wrongdoing by the stockholders."

By the use of worthless notes as an asset of the partnership, Hill, Barnette and Wood were enabled to pay for their \$52,000 worth of stock in the corporation, and Wood was enabled to convert his portion thereof, \$13,000, into cash by the hereinbefore considered sale of his stock. In Michie on Banks and Banking, page 367, it is said:

"Where the directors of a bank take notes, judgments, and the like in payment of subscriptions to stock, it is incumbent on them to show that such notes, etc., were of the value for which they were transferred, or that they exercised ordinary care in ascertaining their value, and had reason to believe them to be worth the amounts for which they were taken, in order to escape liability therefor, as such transactions are a deviation from the usual course of business. For accepting such unauthorized securities in payment for stock the directors may, in case of loss, be held personally liable for the full amount of the stock so paid."

It is respectfully submitted that appellant is entitled to judgment against the said Hill, Wood and Jesson for \$69,908.94 on this transaction.

IV.

The Payment of Accrued Interest to Partnership.

APPELLANT IS ENTITLED TO JUDGMENT AGAINST APPELLEES JOHN A. JESSON, JAMES W. HILL AND R. C. WOOD FOR \$39,642.81 PAID TO SAID PARTNERSHIP AS ACCRUED INTEREST ON NOTES PURCHASED FROM IT BY SAID CORPORATION.

This matter is covered by Findings 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 35, 36, 37, 38, 39, 40 and 57 hereinbefore set out in full.

This transaction also arises partly out of the taking over of the business of the partnership by the corporation bank. Pursuant to the written agreement entered into for the accomplishment of this purpose, there was transferred to the corporation loans and discounts aggregating \$353,842.54. This agreement, as found by the court (F. 15), is annexed as "Exhibit One" to the complaint and is found at pages 44 to 66 of the record. A reference to it will show that said item of loans and discounts is made up of a great number of notes, listed separately both by number and name of borrower and a f t e r each note is placed the amount thereof, a schedule of which is attached to the contract (R. 46, 56-62). In said agreement the partners are designated as "parties of the first part" and the corporation as "party of the sec-

ond part" (R. 44-45), and it is therein provided (R. 51):

" The parties of the first part hereby assign, transfer and set over unto the party of the second part all of their outstanding loans and discounts as the same appear in the scheduled statement hereto attached marked 'Exhibit A,' and the notes of the debtors given to evidence the amount of such loans and discounts, together with all mortgages upon real or personal property that have been given to secure the same, and hereby agree that they will transfer to the party of the second part by proper endorsement all of said notes and mortgages and forthwith deliver the same unto the possession of the party of the second part.

" * * * The intention of this agreement being to place the party of the second part in the shoes of the parties of the first part as to the banking business of the Fairbanks Banking Company as to all properties heretofore mentioned and specified."

Leading up to the execution of this written agreement it appears from the Findings that said partnership (which was also known by the name of Fairbanks Banking Company), owing to financial difficulties, had been compelled in December, 1907, to suspend business and close its doors, passing into the hands of trustees (F. 4). In the forepart of January, 1908, certain proposed incorporators held a meeting for the purpose of organizing a corporation to purchase, take over and absorb the business of said partnership. At said meeting negotiations for such

purchase were begun and a committee was appointed to go into the details of the reorganization and report a basis upon which the business should be taken over (F. 7). This committee met on January 5, 1908, and reported a scheme for accomplishing such purpose which, among other things provided the acceptance of the partnership property on a basis of \$288,000 in excess of its liabilities, and that all interest on existing loans as of December 19, 1907, be computed to *February* 15, 1908, and the amount of such accrued interest be placed to the credit of the old institution on the books of the new corporation, the same to be payable on or before December 31, 1908 (F. 8). This report was submitted to a meeting of the proposed incorporators on January 6, 1908, and adopted, and at the same meeting subscriptions to the capital stock were taken, and it was also agreed on behalf of the partnership that it would turn its property over to the corporation on the terms specified in said report (F. 9, 10, 11). The Fairbanks Banking Company, a corporation, became such on January 21, 1908, and on February 8, 1908, a meeting of the subscribers to the capital stock was held for the purpose of executing their stock subscription notes, and the election of a board of directors to serve until the articles of incorporation arrived from Nevada (F. 12). Some time in March, 1908, said articles of incorporation arrived, and immediately thereafter a meeting of the stockholders was held which elected a board of directors and adopted by-laws and "passed a resolution to the effect that the

matter of taking over the property of the Fairbanks Banking Company, a partnership, *be left to the board of directors.*" (F. 13.) Thereafter on March 12, 1908, the board of directors held a meeting and adopted the resolution of the proposed stockholders referred to in Finding 8, "except that the resolution providing for the payment of accrued interest up to *February* 15, 1908, was by them amended so as to read '*March 15, 1908*'" (F. 14). On March 16, 1908, the written agreement referred to was entered into in which the value of the assets of the partnership in excess of its liabilities was reduced from \$288,000 to \$252,000 (F. 15) *and no provision whatever was made for the payment of said accrued interest.* The matter of preparing the paper for the transfer of said property was, by the directors, left to the executive committee, who examined into the affairs of said partnership, and afterwards prepared and submitted to the board of directors said written agreement and the same was approved by them (F. 17). It was signed on March 16, 1908, by said Barnette and Hill, two members of the partnership, and by the corporation through its president and secretary (F. 15). Later on, in April, 1908, Wood, the remaining partner signed it, "knowing that the same did not provide for the payment of said accrued interest" (F. 21). On March 23, 1908, pursuant to the resolution of the board of directors adopted on March 12, 1908, said accrued interest was computed to March 15, 1908, in the sum of \$39,652.81, which was placed to the credit of said partners and subsequently paid

to them in cash (F. 36). At the time said accrued interest was computed and allowed to said partners and placed to their credit as aforesaid, the appellee Hill was vice-president of said corporation and member of its executive committee; Wood was its cashier; and Jesson a member of its board of directors. Each acquiesced in the transaction and gave consent thereto with full knowledge of the existence of the above facts found by the court, and Hill and Wood as members of the partnership were personally interested therein adversely to the corporation (F. 57).

On the facts as thus found, the court concluded as a matter of law that the appellees Jesson, Hill and Wood were not liable to appellant for the allowance of said accrued interest and dismissed appellant's action therefor (C. of L. 8, R. 199; Decree 9, R. 203). Appellant proposed Conclusion of Law No. 1 allowing him to recover against said appellees for said item (R. 204), which was denied. Appellant excepted to the denial of said proposed Conclusion of Law No. 1 (R. 218, Ex. 3) and particularly excepted to the denial of that portion of the same which related to said item (Exs. 6, 7, R. 219.) Appellant also excepted to said dismissal (Exs. 12, 13, 14; R. 220, 221). The above matters are assigned as error in Assignments of Error Nos. 3, 6, 7, 12, 14, 19, 20 (R. 229, 230, 231, 232, 233).

The payment to said partners of this accrued interest item was a clear gift to them of the assets of the bank. The so-called excess of partnership assets

over liabilities aggregating \$52,000 was more than exhausted by the purchase of \$69,908.94 of worthless past due paper, heretofore commented on. To add to that a gift of \$39,642.81 would make extreme generosity to himself the criterion of duty on the part of an officer of a bank. It would have required 76 per cent of this so-called excess to wipe out the Tanana Electric notes alone, paper known to be utterly worthless and for which full value was paid. But the directors even included in said item interest on the Tanana Electric Company's notes, as well as all other past due and worthless paper (F. 22). These officers and directors also generously paid to said partners \$341,949 for the capital stock of the Gold Bar Lumber Company which never yielded a dollar profit to the partners or the corporation (F. 40), and which was then tied up in litigation (Written Agreement, R. 40). In arriving at this valuation on said Gold Bar Lumber Company stock it was agreed in said written agreement that the value of its timber lands should be increased one-third, or \$68,318.68, just prior to the purchase (R. 64). Having previously given said partners \$138,227.62 for worthless notes and increased valuation of this lumber company stock, was it not time for these officers to begin exercising some degree of care in protecting the interests of those who were not interested adversely to said corporation?

But it was contended at the trial that the payment of this accrued interest item was made with the

approval of the incorporators. The answer is found in *Coddington v. Canaday*, (Ind.) 61 N. E. 567, 571:

“ As against the claims of creditors of an insolvent corporation, the directors can not shield themselves from liability for gross mismanagement of its affairs by interposing a pretended authorization by the stockholders.”

But this transaction, even if tentatively authorized by the proposed incorporators, was not included in the written agreement thereafter entered into wherein the full details on which the transfer was to be made were reduced to writing and signed by both the corporation and the partnership. While the proposed incorporators in their proposal for reorganization did provide as set out in Finding 7 for computing interest on existing loans to *February* 15, 1908, they also proposed the acceptance of the notes, properties and securities of the partnership at a valuation of \$288,000 in excess of its liabilities (F. 8). This was nothing but a proposed basis for reorganization. But after the incorporation was completed and when the stockholders came to act upon the matter, they left “the matter of taking over the property” of the partnership to the board of directors (F. 13). When the board came to act, it adopted and approved the resolutions of the proposed stockholders except they provided for payment of accrued interest to *March* 15, 1908 (F. 14), instead of *February* 15, as proposed by the incorporators. Thus it will be seen that the directors did not act in pursuance to said res-

olution. The board of directors then left the matter of preparing the papers for the transfer to the executive committee, under whose direction the above mentioned written agreement was prepared and afterwards submitted to and approved by the board (F. 17). This committee "examined the affairs of said partnership" (F. 17). We don't know how thorough that examination was or what it disclosed further than that after such examination the written agreement was prepared and it omitted all reference to allowance of accrued interest, and reduced the excess of purported assets over liabilities from \$288,000 to \$252,000 (F. 15).

The terms of the written agreement are plain. "The parties of the first part do hereby assign, transfer and set over unto the party of the second part *all of their outstanding loans and discounts as the same appear in the scheduled statement hereto attached and the notes of the debtors given to evidence the amount of such loans and discounts.* * * * The intention of this agreement being to place the party of the second part *in the shoes* of the parties of the first part * * * as to all properties hereinbefore mentioned and specified" (R. 51-2). In said schedule, each loan is listed separately followed by the amount thereof, and the total aggregates \$353,842.54 (R. 56-62). The sale of the notes carried with them the interest accrued and accruing. This became the final agreement between the parties, and pursuant to it the transfer was made. The directors had no power to

change the terms of this plain agreement and place to the credit of partners said sum of \$39,642.81. It was a gift to them pure and simple. It not only was an act in violation of the written agreement but it violated the proposal of the intended incorporators as well. It was a wilful, wrongful diversion of the assets of the corporation for which they are liable. The matter is covered generally by the principle of the authorities heretofore cited. The following are specifically referred to:

Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662;

Coddington v. Canaday, (Ind.) 61 N. E. 567;

Bosworth v. Allen, (N. Y.) 61 N. E. 163;

Wardell v. Railroad Co., 103 U. S. 651, 26 L. ed. 509;

Ryan v. Railway Co., 21 Kan. 365;

Cooper v. Hill, 36 C. C. A. 402, 407;

Michie on Banks & Banking, pp. 296-297.

It will be noted by the court that of said accrued interest so paid by the bank to said partners, approximately \$7500 was never collected by the bank from the borrowers (F. 37). To this extent, such payment resulted not alone in loss of earnings but a depletion of the very corpus of the bank itself. In so far as the bank collected such interest from the borrower, it reimbursed itself for the gift; but still it sustained a direct loss of earnings by this transaction. Having bought the paper, it was entitled to the earnings on

its money invested therein. These appellees had no right to give them away to a favored few, nor distribute them among the stockholders in any manner, except as dividends lawfully declared and fairly paid.

Appellant has asked that he be granted recovery from appellees Jesson, Hill and Wood for the entire \$39,642.81 dividing the same into two items, namely: accrued interest on partnership notes paid to Barnette, Hill and Wood and which was not collected, \$7500, and balance of accrued interest paid to Barnette, Hill and Wood on partnership notes purchased, \$32,142.81 (Bill of Exceptions 3, 6 and 7, R. 219; Assignments of Error 3, 6, 7, 19 and 20, R. 229-230, 233).

V.

Interest on Money Invested in First National Bank Stock.

APPELLANT IS ENTITLED TO JUDGMENT AGAINST APPELLEES JOHN A. JESSON, R. C. WOOD, JOHN L. MCGINN AND RAY BRUMBAUGH JOINTLY AND SEVERALLY FOR ONE YEAR'S INTEREST UPON THE AMOUNT OF THE FUNDS OF SAID BANK WHICH WERE INVESTED IN THE CAPITAL STOCK OF THE FIRST NATIONAL BANK.

Appellant requested the court to make a conclusion of law as to this item, being appellant's proposed Conclusion of Law No. 11, and the same is found in the Bill of Exceptions at page 206 of the record, which

was denied and appellant's action therefor dismissed (C. of L. 8, R. 199; Decree 9, R. 203). To the denial of this proposed conclusion of law, appellant duly excepted (B. E. 11, R. 220) as well as to said dismissal (Exs. 11, 12, 14; R. 220, 221), and the same was assigned as error in Assignments 11, 12, 13 (R. 231, 232). The facts upon which this error is based are set out in Findings 55 and 59 (R. 193-4, 196), the substance of which is as follows:

That in May, 1909, the Fairbanks Banking Company and the Washington-Alaska Bank of Washington each purchased one-half of the capital stock of the First National Bank for which each paid the sum of \$62,500.00 or \$125,000.00 in all, and continued to own and hold said stock until May 4, 1910, on which date the Fairbanks Banking Company sold said entire capital stock to appellees Wood and McGinn for \$125,000 and received said amount in payment therefor delivering to them said capital stock of said First National Bank; that at the time said banks purchased said stock, they gave to said Wood an option to purchase the same on or before June 1, 1910, for the said sum of \$125,000, and said sale to Wood and McGinn was made in pursuance to said option; that neither of said banks ever received any dividend on said stock during the time the same was owned and held by them, and neither of them ever received any interest from Wood and McGinn, or anyone in their behalf on the money they had invested in said stock during the time the same was invested; that at

the time of said sale to McGinn and Wood the appellees Jesson, Wood, McGinn and Brumbaugh were officers and directors of said Fairbanks Banking Company and each consented to said sale on the terms above stated (F. 55, 59).

In order that the court may not become confused in the names of these banks, it may be stated that at the time of this transaction there were three corporations doing a banking business at Fairbanks, Alaska, namely, Fairbanks Banking Company, organized under the laws of *Nevada*, Washington-Alaska Bank of *Washington* and First National Bank. Said corporation Fairbanks Banking Company was the successor of the partnership of Barnette, Hill and Wood, doing business under the partnership name of Fairbanks Banking Company. On September 14, 1909, the Fairbanks Banking Company, a corporation, bought the entire capital stock of said Washington-Alaska Bank of Washington and subsequently, on October 1, 1910, the Fairbanks Banking Company took over the assets of the Washington-Alaska Bank of Washington, assumed and agreed to pay its outstanding liabilities, and thereupon the last named bank ceased to exist or do business as a bank. Thereupon the Fairbanks Banking Company, by amendment to its articles of incorporation, changed its name to Washington-Alaska Bank of *Nevada*, under which name we deal with it in the Receivership herein (F. 56, 64).

From the foregoing it will be seen that while in the beginning the Fairbanks Banking Company was interested in this First National Bank stock transaction only to the extent of the investment therein of \$62,500 of its own funds, it did within four months thereafter become very much interested in the entire transaction through the investment of \$250,000 of its own funds in the entire capital stock of its co-owner, the Washington-Alaska Bank of Washington. For an entire year \$62,500 of its funds were directly dependent on this First National Bank stock for any return thereon and for eight months it was likewise dependent as the sole stockholder of its co-owner the Washington-Alaska Bank of Washington for any return on said \$62,500 invested by the last named bank. For a year this profitless investment was carried by the two banks for the sole good of Wood and McGinn and without any cost to them whatsoever. When the Fairbanks Banking Company took over said Washington-Alaska Bank of Washington, it acquired as a part of the assets of said last named bank its right to interest on said \$62,500.00 invested by it in said stock. The Receiver therefore has the right to recover interest on the entire \$125,000.00.

The basis for recovery upon this item is that the officers and directors of the bank misappropriated the funds and property of the bank for the exclusive use and benefit of Wood and McGinn, and without benefit or profit to the bank. (Amended Complaint, Par. 28, R. 35.) While the purchase of said stock and the giving of said option were not the acts of the

same officers who afterwards concluded the sale to Wood and McGinn, yet such latter officers, defendants here, ratified the entire transaction when they consented to said sale being made "in pursuance to said option." This option was given at the time of the purchase of said stock by the bank. According to it, Wood had the right at any time within one year to take up the stock at the price paid for it by the bank. The bank carried the load until just short of the expiration of the option without dividend on the stock or interest on the investment. For whose use and benefit could the bank have been acting under such circumstances except that of the optionees? Coincident with the purchase by it, it gave to the optionees the right to buy at the same price paid by it at any time within one year. By this means the bank agreed to carry the investment for them without cost to them, and this these defendants, Jesson, Wood, McGinn and Brumbaugh ratified when they consented to said sale on these terms and under said option. This is not a question of holding the officers for making a bad bargain in purchasing the stock, nor for selling it at an under-valuation, on which matters the honest judgment of men might vary. The point here is that these officers permitted the bank's funds to be misappropriated to a use and benefit not its own. The fault would be just as great whether the value of the stock be small or great. The value of the stock is of no consequence except as it expresses the extent of the misappropriation. It might at first blush appear that the bank's officers who gave the

option committed the real misappropriation and therefore should have been proceeded against rather than those who ratified it and consented to said sale; but the act was not complete until the option was exercised. It might not have been exercised at all, in which event there would have been no misappropriation of funds.

For this misappropriation, the bank through its Receiver, is entitled to interest at the legal rate from the date of the misappropriation. *Cooper v. Hill*, 36 C. C. A. 402, 409.

In this manner McGinn and Wood got the use of this money without the payment of interest or incurring any risk of loss. McGinn was vice-president, and each was member of the board of directors of the Fairbanks Banking Company at the time the sale was made to them (F. 59). Each again safe-guarded his own personal interest to the exclusion of that of the bank, to which their fellow directors Jesson and Brumbrugh consented, and are therefore equally involved with them. For such they should be made to respond to the extent of the damage sustained which would be the loss of interest on the money so invested at the legal rate, which was 8%.

The principles of law applicable to directors and officers who promote their own interests by dealing with corporate funds have been fully discussed heretofore. Reference is again respectfully made to the following:

Michie on Banks & Banking, pp. 296-297;

Coddington v. Canaday, (Ind.) 61 N. E. 567;

Wardell v. Railroad Co., 103 U. S. 651, 26 L. ed. 509;

Ryan v. Railway Co., 21 Kan. 365;

Bosworth v. Allen, (N. Y.) 61 N. E. 163.

It is respectfully submitted that appellant is entitled to judgment on this item against appellees Jesson, Wood, McGinn and Brumbaugh jointly and severally for one year's interest on \$125,000.00 at the legal rate in Alaska of 8%, to-wit, \$10,000.

VI.

Interest on Foregoing Items.

APPELLANT IS ENTITLED TO INTEREST ON EACH OF THE FOREGOING ITEMS AT THE LEGAL RATE AS PROVIDED BY THE LAWS OF ALASKA, WHICH IS EIGHT PER CENT PER ANNUM, FROM THE DATE OF EACH MISAPPROPRIATION OF THE FUNDS OF SAID BANK.

—*Cooper v. Hill*, 36 C. C. A. 402, 409;

Burrows v. Niblack, 28 C. C. A. 130;

Bundy v. Jackson, 24 Fed. 628.

In the case of *Cooper v. Hill*, *supra*, in an opinion by SANBORN, it is said:

“ When money has been misappropriated or converted to his own use by a defendant, interest

is given as damages to compensate the complainant for the loss of the use of his funds. In cases of the latter class, its allowance is sometimes a matter of discretion; *but it is a general rule, both at law and in equity that, whenever one has wrongfully detained or misappropriated the money of another, he must pay interest at the legal rate from the date of the misappropriation or from the beginning of the detention.*"

VII.

Recapitulation.

Appellant prays that the decree of the lower court be corrected in the foregoing particulars and that, in addition to the relief therein granted him, this court shall render a decree in his favor on the record herein against the following officers and directors of said bank in the following amounts:

1. Against the appellees John A. Jesson, James W. Hill and E. R. Peoples, jointly and severally, on the purchase of the stock of Strandberg Brothers, Emma Strandberg and B. E. Johnson, with interest thereon from November 18, 1908.....\$12,000.00
2. Against the appellees John A. Jesson, Ray Brumbaugh, John A. Clark, J. A. Healey, and George Preston, jointly and severally, on the purchase of the stock of John L. McGinn, with interest from October 13, 1910.... 6,000.00

3. Against the appellees John A. Jesson, James W. Hill and R. C. Wood, jointly and severally on the purchase of the stock of R. C. Wood, with interest from June 30, 1908..... 13,000.00
4. Against the appellees John A. Jesson, James W. Hill and R. C. Wood, jointly and severally for the purchase of the worthless Tanana Electric Company notes from Fairbanks Banking Company, a partnership, with interest thereon from March 16, 1908..... 27,997.38
5. Against the appellees John A. Jesson, James W. Hill and R. C. Wood, jointly and severally, for the purchase of other worthless notes from Fairbanks Banking Company, a partnership, with interest thereon from March 16, 1908..... 41,911.56
6. Against the appellees John A. Jesson, James W. Hill and R. C. Wood, jointly and severally for paying to Fairbanks Banking Company, a partnership, accrued interest on notes purchased from it, with interest thereon from March 16, 1908..... 39,642.81

7. Against appellees John A. Jesson, R. C. Wood, John L. McGinn and Ray Brumbaugh, jointly and severally for one year's interest upon the amount invested in the capital stock of the First National Bank, on account of the sale of said stock to John L. McGinn and R. C. Wood, with interest thereon from May 4, 1910.....\$10,000.00

All of which is respectfully submitted.

O. L. RIDER,
Attorney for Appellant.

3
No. 2593.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

F. G. NOYES, as Receiver of Washington-Alaska Bank, a
Corporation,

Appellant,

vs.

R. C. WOOD, JOHN L. MCGINN, RAY BRUMBAUGH,
J. A. JESSON, JAMES W. HILL, E. R. PEOPLES,
J. A. HEALEY, JOHN A. CLARK and GEORGE
PRESTON,

Appellees.

BRIEF OF APPELLEES.

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CURTIS HILLYER,
CHAS. J. HEGGERTY,
Of Counsel.

Filed this.....day of May, A. D. 1917.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

The James H. Barry Co.
San Francisco

Filed

MAY 19 1917

F. D. Monckton,
Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

F. G. NOYES, as Receiver of Wash-
ton-Alaska Bank, a Corporation,

Appellant,

vs.

R. C. WOOD, JOHN L. MCGINN,
RAY BOUMBAUGH, J. A. JES-
SON, JAMES W. HILL, E. R. PEO-
PLES, J. A. HEALEY, JOHN A.
CLARK and GEORGE PRESTON,

Appellees.

No. 2593

BRIEF OF APPELLEES.

This is a cross appeal, the original appeal being No. 2528 in this Court.

The facts pertinent to this appeal are succinctly set forth in the opinion of the Court below, as follows:

“It is alleged that the Fairbanks Banking Com-
pany was organized as a corporation, under the
laws of the State of Nevada, on January 21, 1908,
and began business at Fairbanks on March 15,

1908, and continued as such until receivers were appointed to take over its assets and wind up its business on January 5, 1911, the name of the corporation, however, having been changed to that of Washington-Alaska Bank on September 14, 1910. The defendants were officers and directors of the corporation during the time it was carrying on business, and it is by reason of wrongful and negligent acts in their capacity as such officers and directors that the plaintiff seeks to hold them liable in this action.

"The corporation was formed for the purpose of taking over the business of the Fairbanks Banking Company, a copartnership consisting of E. T. Barnette, R. C. Wood and James W. Hill, and the first matter charged in the complaint is on account of an over-valuation of the assets of that partnership, and particularly in respect to two items of such assets, namely, certain shares of stock representing four-fifths of the entire capital stock of the Gold Bar Lumber Company, a corporation organized under the laws of the State of Washington, and doing business in that State, which was taken over by the corporation from the partnership at an agreed valuation of \$341,949.00, and which it is charged cost such partnership only \$248,067.89, and was at the date of the transfer worth less than that sum, the over-valuation thus being in excess of \$93,881.11; and of certain notes then past due, worthless and uncollectible, amounting to \$53,287.49. A written agreement was executed by the copartnership and the directors of the corporation on March 16, 1909, reciting the terms and conditions of the transfer of the property, and it is charged that the directors in office at the time unlawfully credited the partnership with, and agreed to pay to said partnership, on December 31, 1909, the sum of \$39,642.81, repre-

senting interest accruing on the notes transferred to the corporation from December 31, 1907, to March 15, 1908, which item was not included in the written agreement, and it is charged to have been voluntarily given to the partnership, without any consideration therefor.

"On September 30, 1909, it is charged, the directors purchased the stock of the Washington-Alaska Bank, a corporation organized under the laws of the State of Washington, and doing business at Fairbanks, paying therefor the sum of Two Hundred and Fifty Thousand Dollars (\$250,000.00); that the amount of such stock was only \$150,000.00; and that by reason of such purchase more than \$100,000.00 of the assets of the bank were lost. It is charged that on May 12, 1909, the directors purchased one-half of the capital stock of the First National Bank for the sum of \$62,500.00, and that at the same time the Washington-Alaska Bank purchased the remaining one-half of the stock of the First National Bank for a like sum; and that subsequently, on May 12, 1910, the officers and directors of the Fairbanks Banking Company sold all the stock of the First National Bank to R. C. Wood and John L. McGinn—that is, the one-half originally purchased, and the other half which it had acquired in the meantime through its purchase of the Washington-Alaska Bank stock—for the sum of \$125,000.00, and that by reason thereof the Fairbanks Banking Company sustained a loss of \$25,000.00.

"And finally, it is charged that on October 1, 1910, the officers and directors of the Fairbanks Banking Company caused its business and assets to be consolidated and amalgamated with those of the Washington-Alaska Bank, whose stock it then held, and assumed all the liabilities of the Washington-Alaska Bank, which were greatly in excess

of its assets, causing still further injury to the Fairbanks Banking Company.

"It is alleged that the Receiver has taken charge of the assets of the company, and so far as possible reduced them to cash and distributed them among the creditors, but that he has been unable, so far, to pay them only fifty per cent. of the amounts due them, and that after exhausting all the remaining assets and applying them upon the corporation's indebtedness, there will still remain a large sum due to the creditors of the bank.

"The defendants who have appeared by their answers have denied all misconduct and acts of negligence on their part, and have further set up that after the appointment of a receiver, E. T. Barnette and his wife transferred to the receiver, a large amount of property for the purpose of paying all the obligations of the corporation, and that the same was accepted by the receiver, under the order of this Court, in full settlement of any liability on his part; and that inasmuch as he was at all times a director with the answering defendants, and jointly liable with them for any acts of misconduct or negligence, that this transaction operates as a bar to any suit against them; and further, that the receiver has received certain sums of money from the property thus transferred by Barnette and his wife, and that the sums so received exceed the sum for which any answering defendant is liable" (No. 2528, pp. 1202-1206).

This cross-appeal challenges the sufficiency of the findings to support the judgment in certain particulars, and the sufficiency of the evidence to support two of the findings. These last two appear from plaintiff's Assignments of Error, Nos. 1 and 2, and affect the

foregoing transactions which are complained of as constituting unlawful purchases of stock by the directors, viz, the Strandberg stock and the McGinn stock.

As to the Strandberg stock the Court found that it was taken over in partial satisfaction of a pre-existing debt (p. 189).

As to the McGinn stock the Court found that it was purchased by the cashier with money loaned him for that purpose by the bank (p. 190).

As to these two transactions only does the record set forth the evidence. The other questions presented on this appeal all relate to the propriety of the conclusions of law in view of the facts found.

ASSIGNMENT OF ERROR NO. 1—THE STRANDBERG STOCK.

This assignment is founded on the granting of Finding No. 45 for the reason that the same is contrary to the evidence, and is an incomplete finding as to the matter of the surrender of the shares of stock owned by Strandberg Brothers, Emma Strandberg and B. E. Johnson in that it fails to find that at the time the note of Strandberg Brothers was given, the shares of stock of said Strandberg Brothers were accepted by the bank as collateral security therefor (p. 227).

The finding of the Court, No. 45, was as follows:

“That upon the 18th day of November, 1908, Strandberg Brothers were the owners of 100 shares

of the outstanding capital stock of said Fairbanks Banking Company, Emma Strandberg was the owner of 10 shares, and B. E. Johnson was the owner of 10 shares.

"That said stock was taken in part payment of a loan that the bank had theretofore made to said Strandberg Brothers and said Johnson, who were mining copartners, and the bank also received at said time the further sum of \$4,000.00 in cash, which fully paid said loan. That said transaction amounted to the taking of stock for a pre-existing debt, rather than the purchase of stock by the Board of Directors. That said directors believed at said time that said loan was precarious; and said directors, in taking said stock in partial satisfaction of said loan, did so in good faith and for the best interest of the corporation" (p. 189).

The evidence in support of this finding is thus epitomized in the record (p. 215):

"That the substance of the whole of the testimony offered and received on the trial concerning the surrender of said stock of the said Strandberg Brothers, Emma Strandberg and B. E. Johnson was that the said Strandberg Brothers and the said B. E. Johnson were mining copartners and that the said Emma Strandberg was the wife of one of the said Strandbergs, and that on the 5th day of November, 1908, the said Strandberg Brothers were the owners of 100 shares of the capital stock of said bank of the par value of \$10,000.00, and the said Emma Strandberg was the owner of 10 shares of said stock of the par value of \$1,000.00, and the said B. E. Johnson was the owner of 10 shares of said stock of the par value of \$1,000.00, that on the 5th day of November, 1908, it was resolved by the executive committee, the defendant

Hill being present as a member thereof, that a loan of \$15,000.00 be made to Strandberg Brothers on the security of their 110 shares of Fairbanks Banking Company stock and notes aggregating \$2,500.00, and that thereafter, on November 12, 1908, at a meeting of the Board of Directors at which the defendants, J. A. Jesson, E. R. Peoples and James W. Hill were present, the minutes of the meeting of the executive committee held on said November 5, 1908, were read, and on motion duly made and seconded, were approved, ratified and passed as the action of said board. That pursuant to said proceedings a note in the sum of \$17,050.00 payable to said bank, was executed by David Strandberg and Strandberg Brothers & Johnson, dated November 5th, 1908, due May 31, 1909, and the proceeds thereof in the sum of \$15,000.00 was placed to the credit of Strandberg Brothers & Johnson in their deposit account, and the said note of \$17,050.00 was secured by the said stock of the said Strandberg Brothers and Johnson as collateral.

"That at a meeting of said executive committee held on November 18, 1908, the defendants, J. A. Jesson and James W. Hill being present as members thereof, the matter of taking over the Strandberg Brothers and Johnson stock was discussed, and the minutes thereof further reciting that 'In taking over this stock the proceeds were to apply to the taking up of the loan of Strandberg Brothers to the bank. It was moved by Ryan, seconded by Jonas, that Mr. J. A. Jesson take up the stock of Strandberg Brothers and Johnson at par on behalf of the bank. Motion carried.' That at a meeting of the Board of Directors held on December 12, 1908, at which the defendants James W. Hill, E. R. Peoples and J. A. Jesson were present as members thereof, the minutes of said meeting of the executive committee held on said

November 18, 1908, were read, and on motion duly made and seconded were approved, ratified and passed as the action of the board.

"That on November 19, 1908, said note was cancelled and surrendered to the makers thereof, and said bank took up and cancelled the said stock of the said Strandberg Brothers and the said B. E. Johnson, aggregating \$11,000.00 as aforesaid, and in addition thereto received from said Strandberg Brothers and Johnson the sum of \$4,000.00 in cash. Said stock was charged to the account of treasury stock and the deposit account of Strandberg Brothers & Johnson was credited \$15,000.00 and subsequently the same was withdrawn by them. Afterwards, on November 25, 1908, the deposit account of Emma Strandberg was credited \$1,000.00, being the par value of her said stock, and her 10 shares of stock cancelled and charged to treasury stock, and the amount so credited to her account was by her subsequently, to wit, on February 16, 1909, drawn out by her. *That said Board of Directors believed, at the time said stock was taken up, that said loan was precarious, and said directors in taking said stock in partial satisfaction of said loan did so in good faith and in the belief that it was for the best interest of said corporation.* That in order to get the said Strandberg Brothers & Johnson to take up said note and make said cash payment as aforesaid, it was necessary to include in said settlement the said stock of the said Emma Strandberg."

The Court below discussed this evidence in the following language:

"It appears that on November 18, 1908, 10,000 shares of stock belonging to Strandberg Brothers, 1,000 belonging to Emma Strandberg, and 1,000

belonging to B. E. Johnson, a partner of Strandberg Brothers, were taken in part payment of a loan, the bank also receiving at that time from these parties the sum of \$4,000.00 in cash, making full payment of the loan.

“While this loan was made only a short time before, and the shares of stock mentioned were taken as part security for the loan, it cannot be said from the evidence that such a change had not taken place in the condition of the debtors within that time as to make this transaction for the best interests of the bank, and that the transaction amounted to a taking of stock for a pre-existing debt, rather than, as contended by the plaintiff, that the whole transaction amounted to a purchase of stock by the directors. Undoubtedly, if a loan were made to a stockholder, and some time afterward he found that he was unable to pay the loan, the directors would have been fully justified, under all authorities, in taking his stock in satisfaction of the loan; and the fact that only a few days elapsed between the loaning of the money and the calling of the loan is not sufficient to show bad faith in the directors, nor that they contemplated purchasing the stock at the time the loan was made (No. 2528, pp. 1225-1226.)

The appellant complains of Finding No. 45, because “It fails to find that at the time the said note of “the said Strandberg Brothers was given the shares “of the stock of said Strandberg Brothers were accepted by the bank as collateral security therefor” (p. 218).

The finding as contended for by the cross-appellant would certainly have been improper. There was no cause of action stated against any of the

defendants for wrongful or negligent conduct in making any loan. They were not called upon to offer any evidence in defense of the original making of the loan. The only question which could properly be raised was as to the retaking of the stock.

The undisputed evidence is that the "*Board of Directors believed at the time said stock was taken up that said loan was precarious, and said directors in taking said stock in partial satisfaction of said loan did so in good faith and in the belief that it was for the best interest of said corporation*" (p. 216).

This loan was made by the executive committee on November 5th, 1908, the note was dated November 5th, 1908; presumably the money was advanced on that date, notwithstanding that the resolution of the executive committee was not approved by the Board of Directors until November 12th. The note was cancelled and stock taken back on November 18th, making it two weeks between the original loan and the cancellation instead of seven days, as intimated by appellant at page 65 of his brief. Not that this is very material, except as indicating the wrong inference that can be drawn from testimony if there is a disposition so to do.

It appears that when the original note was made, the note of Strandberg Brothers was given for \$17,050, but the proceeds of the note came to \$15,000.00. There is nothing in the record to explain this discrep-

ancy. Why was this wide margin between the face of the note and the proceeds of it? Probably if this explanation were forthcoming it might establish the wisdom of the board in making the original loan, but as above stated appellees were not called upon to go into the circumstances of the original loan, or make any justification thereof, or defend its legality, because the original making of the loan was not attacked. The case finds the loan in force, its validity unchallenged, and no burden imposed upon the defendants to justify any of their acts in connection with it, until the occasion of the surrender of the stock and the cancellation of the loan.

The evidence is somewhat indefinite as to how the whole transaction was put through the books of the bank. After the loan had been made and the note accepted, it must have been that the account of Strandberg Brothers was credited with the \$15,000 advanced on their note, and the bills receivable account debited with \$15,000, the amount of the note which the bank held. On the surrender of the stock the bills receivable account must have been credited with \$11,000.00, and treasury stock account charged with \$11,000.00. At the same time the bills receivable account must have been credited with \$4000.00 cash, which was received, and the cash account charged with that \$4000.00. What may have happened to Strandberg Brothers in the interval between the making of the loan and the taking back of the stock,

the record does not show. It is quite conceivable that within that interval their affairs may have so altered that the bank was lucky to get anything on the note. If the note of Strandberg Brothers had become worthless, and the \$2500.00 of original collateral notes had likewise become worthless, the board of directors would be warranted in going to the extreme limit in order to secure the \$3000.00 or \$4000.00 cash, and thereby save that much to the bank.

There is one statement in the evidence which is evidently a mistake: "The stocks were charged to the treasury account, and the deposit account of Strandberg and Johnson was credited with \$15,000.00, which was subsequently withdrawn by them." As the whole transaction was for the purpose of cancelling the Strandberg note, it is evident that when the amount was credited to their deposit account, the deposit account must also have been charged with the amount in payment of the outstanding note. Counsel says (p. 70 of his brief), "Regardless, however, of the good faith of the directors or the question of preexisting indebtedness, the fact remains as found by the court in Finding 52 that the taking back of this stock was illegal, wrongful and in violation of the laws of the State of Nevada, under which said corporation was organized." We submit that a fair reading of the findings will show that this Finding 52 does not refer to this transaction.

The corporation was a Nevada corporation. If

anything in the Nevada law forbade the bank to make the original loan on the faith of the security of its own stock, the Nevada law should have been pleaded and proved.

We have fully discussed this question in our brief on the appeal in No. 2528, and we respectfully refer the Court to that brief for a discussion of the following propositions, all pertinent to this assignment of error.

The purchase of the stock was not in violation of the general law (No. 2528, p. 80).

The purchase of the stock was not in violation of the law of Nevada (No. 2528, p. 84).

The plaintiff must plead and prove any law of Nevada upon which he intends to reply (No. 2528, p. 72).

The receiver must allege and show that he represents creditors who were such at the time the stock was purchased (No. 2528, p. 149).

The power of a corporation to take its own stock in payment of an indebtedness owing to it is generally recognized even in jurisdictions which deny that such power impliedly exists or where the statutes contain a prohibition against so doing.

7 Ruling Case Law, 533;

Schulte v. Boulevard Gardens Land Co., 164 Cal., 464, 44 L. R. A. N. S., 156;

Crandall v. Lincoln, 52 Conn., 73, 52 Am. Rep., 560;

Coppin v. Greenlees Co., 38 Oh. St., 275, 43 Am. Rep., 425.

And in *A. & E.*, Encyc. Law., 2d Ed., p. 821, the rule is thus stated:

"In those jurisdictions in which it is held that a corporation has no power to purchase its own shares a corporation could not take its own shares in payment of a debt unless such transaction were reasonably necessary to prevent loss. In all jurisdictions, however, a corporation may take its own shares in payment of a debt due to it from a stockholder to avoid loss."

In the case of *Barto v. Nix*, 46 Pac., 1033, the facts were:

"In 1890 the Bank of Puyallup was organized under the laws of the State with a capital stock of \$100,000 divided into 1,000 shares of \$100 each. This stock was all subscribed for, and 60 per cent. paid thereon before any business was transacted. A. Campbell was the owner of 200 shares of this stock, and on the 13th day of November, 1891, he transferred 199 shares directly to the bank, and received a credit of \$14,000 therefor on the books of the bank, to which he was then indebted; and the bank thereupon attempted to cancel these certificates of stock."

The Court said:

"The appellants earnestly contend that, under our statute, the bank had no authority to take the stock of Campbell in payment of his indebtedness to the bank. It may be conceded that a corporation in this State cannot traffic in its own stock. Such we believe to be the rule established in all the States having similar statutory provisions. But it does not follow that it may not receive such

stock in payment of the indebtedness of one of its stockholders when such transaction is bona fide, and for the purpose of protecting the corporation from loss. In our opinion, the transaction between the bank and Campbell was authorized, and thereby the bank became the owner of the stock in question, and had the right to reissue it."

In general a banking, or other corporation, may take its own stock to secure or cancel debt already incurred, regardless of whether prohibited by statute.

Zane on Banks and Banking, p. 189, Sec. 119;
German Savings Bnk. v. Wulfekuhler, 19 Kan.,
 60;

Taylor v. Miami Ex. Co., 6 O., 177;

Dalzelle v. Commercial Bank, 82 Mo. App.,
 264;

Chillicothe Branch of State Bank v. Fox, Fed.
 Cases, No. 2683;

Dock v. Schlichter-Jute Cordage Co., 167 Pa.,
 370, 31 Atl., 656;

Colburn v. Oberlin Bldg. & L. Assn., 35 O.
 St., 258.

And in *Taylor v. Miami Exporting Co.*, 6 Ohio, 177, it was held that a corporation may do so although the stockholder be solvent at the time.

In *City Bank v. Bruce*, 17 N. Y., 507, involving a transaction governed by the laws of Ohio, the Court held that the action of the plaintiff corporation in permitting its stockholders, who were indebted to it

on their stock notes, to pay such notes by the surrender of their shares of stock, violated no rule of the common law or of the statutory law of Ohio. In so holding it cited *Taylor v. Miami Exporting Co.*, 6 Ohio, 177, saying that that case held that a bank might receive its own stock in payment of a debt.

ASSIGNMENTS OF ERROR NOS. 2 AND 10—THE
MCGINN STOCK.

Appellant claimed that Finding No. 49 was contrary to the evidence and incomplete as failing to find that the cashier became the agent of the bank in borrowing the money to take up the stock and in taking up the stock (p. 218).

Assignment of Error No. 10 was on the ground that the conclusion of law did not follow the finding (p. 220).

The finding of the Court was:

“That a short time prior to the 13th day of October, 1910, John L. McGinn, as a stockholder of the Washington-Alaska Bank, formerly the Fairbanks Banking Company, demanded the right to inspect its books and papers, and threatened that unless this right was granted him immediately, to make application for an order permitting him to do so and for the appointment of a receiver of the said Washington-Alaska Bank. That the directors of the Washington-Alaska Bank, fearing that information obtained by such an investigation would be used by said McGinn in promoting the interests of the First National Bank in its business, and that

if such information was refused and any litigation was started it would impair public confidence in the Washington-Alaska Bank, and perhaps start a run of its customers and depositors on said bank, acting under this belief, authorized the cashier to loan a purchaser sufficient funds to pay for the stock of said McGinn; one of the directors stating at said time that he had a purchaser who would be willing to purchase said stock for the sum of \$6,000.00 but it would be necessary for him to borrow money to complete said purchase; that, as the matter was urgent and the purchaser was not immediately available, the cashier purchased the stock in his own name and gave his note to the bank for the amount thereof and paid to said John L. McGinn the sum of \$6000 for his 100 shares of capital stock. That thereafter, and on or about the 25th day of October, 1910, said cashier, without the knowledge of any of the directors, cancelled his note and charged the amount thereof to the bank, and surrendered his stock to the bank, and the stock was thereafter held, with other treasury stock of the company" (pp. 190-191).

The substance of the testimony in support of this finding was as follows:

"That, at the time when the defendants George Preston, J. A. Healey, and John A. Clark were directors of the said Washington-Alaska Bank and about the month of October, 1910, and prior to the twelfth day of said month, John L. McGinn, who had theretofore been a director of said Washington-Alaska Bank, formerly Fairbanks Banking Company, and who had for a number of years been attorney for said bank, and was the owner of 100 shares of the capital stock thereof, notified the vice-president and manager of said bank, J. Albert

Jackson, that he intended to exercise his rights as a stockholder to examine all the affairs of said bank and would do so, and further stated that he would sell his stock for the sum of \$6000.00. That the stock of said John L. McGinn was of the par value of \$10,000.00; that he had received \$2,000.00 in dividends and that he was willing to sell said stock for the sum of \$6000.00; that he was one of the owners of the First National Bank of Fairbanks, having recently acquired that property, and that he needed all the money he could get; and that, as the First National Bank was a rival bank of the Washington-Alaska Bank, he did not desire to have any stock in the said Washington-Alaska Bank.

"That an intense rivalry existed between said banks at said time, and there was keen competition in the purchase of gold-dust and the acquiring of banking business, and said John L. McGinn notified said J. Albert Jackson, vice-president and manager of the Washington-Alaska Bank, that he would exercise his right as a stockholder to demand an inspection of the books of said Washington-Alaska Bank and other records, thus enabling him to secure information respecting the clients, customers, creditors and debtors of the said Washington-Alaska Bank that could be by him used to the advantage of said First National Bank and greatly to the detriment of said Washington-Alaska Bank.

"That said demand and said statements were by said J. Albert Jackson reported to the Board of Directors or the greater part thereof, and an informal discussion was had by a number of said directors as to what was advisable to be done; that it was also reported by said vice-president and manager, J. Albert Jackson, that said McGinn had threatened that if his demand for an inspection of

the books and records of said bank was not complied with he would bring a suit against the said Washington-Alaska Bank as a stockholder thereof, asking for the appointment of a receiver, on the ground that, as a stockholder he was refused information that he was entitled to receive, and on the further ground that the officers of said Washington-Alaska Bank were mismanaging said bank; in that they were paying more for gold-dust than they were justified in paying, and for other acts.

"That D. H. Jonas, one of the directors of said bank, stated to the directors, including said defendants, that he was satisfied that he could find a purchaser for said stock at the said price of \$6,000.00; that thereafter and on the 12th day of October, 1910, at the regular monthly meeting of the directors of the Washington-Alaska Bank, the matter was considered by the board of directors and it was then reported by said D. H. Jonas that he had not been able to see the prospective purchaser, but that he was satisfied that said prospective purchaser would take said stock and would probably require a loan from the bank, as he did not at that time have sufficient money to make said purchase; that it was again reported by the vice-president and manager that said John L. McGinn was insistent on said matter and demanded that it be closed at once.

"That at said meeting of 12th October, 1910, it was moved, seconded and duly carried that 'The officers extend a loan to the party to whom McGinn would sell and retain the stock in the bank as collateral.' That it was reported at the said meeting by said D. H. Jonas that it might be some days before the prospective purchaser could be reached, and it was then decided by said Board of Directors, that, if it became necessary to prevent action being taken by said John L. Mc-

Ginn, F. W. Hawkins, the cashier of said bank, be loaned the money necessary to pay for the stock, to wit, the sum of \$6,000.00, and that said stock be held as collateral security for said loan, and that, when the prospective purchaser could be communicated with, a new loan could be made to said purchaser and the stock be issued to said purchaser and be held by the bank as collateral security for such new loan.

"That, in accordance with said agreement, said F. W. Hawkins borrowed from the said bank the sum of \$6,000.00 which he paid to said John L. McGinn for said stock and said stock was assigned by the said McGinn in blank and said F. W. Hawkins executed his note to said bank for said sum.

"That thereafter, and without the knowledge, consent or approval of the Board of Directors, or of said directors as members of said board, said F. W. Hawkins cancelled his note and returned said stock to the bank, and said defendants knew nothing of said transaction until after said bank was closed.

"That the directors of said Washington-Alaska Bank had with them employees whom they trusted and who were under bond, and who had theretofore, so far as said defendants had knowledge or information, strictly performed the orders given to them by the Board of Directors; that the Board of Directors had no information concerning the subsequent action of said F. W. Hawkins with regard to said stock until after the suspension of said Washington-Alaska Bank.

"That said directors refused in behalf of said bank to purchase said stock from said John L. McGinn, and did not purchase said stock, and the surrender of said note by said F. W. Hawkins was wrongful and without authority.

"That no information was furnished to said board of directors that would lead them to believe that the officers of said bank had done or performed any act or thing contrary to the instructions given, and said defendants were never informed that the purchaser whom said D. H. Jonas claimed to be available had not purchased said stock.

"That at the time it was voted to loan said money to the purchaser of said stock, said stock was considered by said Board of Directors to be worth a sum in excess of \$6,000.00 and said loan was considered a perfectly safe loan, and said directors had no reason to believe that said bank was not in a perfectly solvent condition or that the McGinn stock was not worth the full sum of \$6,000.00.

"That had said McGinn been permitted the rights claimed by him as a stockholder and examined into the affairs of said bank, with a view of ascertaining its clients, customers, creditors and debtors, it would have caused said bank great and irreparable damage and would have resulted to the benefit and advantage of the First National Bank, of which said John L. McGinn was one of the principal owners" (pp. 209-214).

The opinion of the Court discussed this portion of the case in the following language:

"A more difficult question is presented by the transaction resulting in the purchase of the stock of McGinn on October 25, 1910. The defendants' answer alleges, and the evidence tended to show, that at this time McGinn was interested in the First National Bank of Fairbanks, and that competition between it and the Fairbanks Banking Company was very keen; that as a stockholder of the Fairbanks Banking Company he demanded the right to inspect its books and papers, and threat-

ened, in case this right was not granted him immediately, to make application to Court for an order permitting him to do so, and also for a receiver; that the directors of the Fairbanks Banking Company feared that information obtained by such inspection would be used by him in promoting the interests of its rival in business, and that any litigation started would impair public confidence in the bank; and perhaps start a run of its depositors on the bank; and that, acting under this belief, they authorized their cashier to loan a purchaser of the stock sufficient funds to pay for the same; that the cashier purchased the stock in his own name, and gave his note to the bank for the amount thereof, and paid McGinn the sum of \$6,000.00 for his 100 shares of stock; and that soon thereafter the cashier, without the knowledge of any of the directors, cancelled his note, and charged the amount thereof to the bank, and that the stock was thereafter held with the other treasury stock of the company. It can scarcely be said that, in view of all these circumstances, the directors were utterly unjustified in purchasing the stock for the bank, if it should be held that the transaction did amount to a purchase by the bank directly, while if the directors really contemplated loaning funds to another for the purchase of the stock, and only authorized such loan, but not a purchase by the bank itself; and the cashier, being a person in whom they had the right to place confidence, thereafter violated their instructions, and without their knowledge, used the funds of the bank to reimburse himself for the purchase of the stock made, then clearly the directors would not be liable therefor, in the absence of direct knowledge of such transaction" (pp. 1226-1227 of No. 2528).

Three propositions are presented here:

1. Did the directors have the right to purchase this stock at all, either under the general law or under the law of Nevada?

This is discussed in our brief in No. 2528 at page 80 *et seq.* to which we respectfully refer.

2. The transaction was not a purchase by the bank, but a loan to Hawkins, the cashier.

The evidence was unequivocal and undisputed on this point.

"That said directors refused in behalf of said bank to purchase said stock from said John L. McGinn and did not purchase said stock" (p. 213).

3. If it was a direct purchase by the bank, the purpose was to protect the bank and the directors were justified in buying the stock.

In regard to the purchase of this stock, the directors were confronted with a situation such that they, in the exercise of their judgment, felt that the interests of the bank would be damaged if they permitted stockholder McGinn an inspection of their books, records and papers. He was connected with the First National Bank, which was a rival bank and there had been a bitter fight on between the two banks, during the season that was then about to close. They felt that if an inspection was permitted by said McGinn

the bank would be greatly injured thereby. This called for an exercise of their judgment, for which they could not be held liable.

Thompson on Corporations, Vol. 2, Sec. 1271.

If they did not permit an inspection of the books and permit the bank to be injured, they then honestly believed that an action would be instituted by the disgruntled stockholder to enforce his rights as a stockholder, and probably for the appointment of a receiver, alleging mismanagement. It is only reasonable to suppose that the directors, knowing the conditions that prevailed in Alaska, realized from past experiences that the least whisper or suggestion of mismanagement, however wrongful or untrue the same might be, would immediately precipitate a run on the bank. This would necessarily close its doors, as no bank has sufficient funds always available from which to pay the demand deposits; and there were no other banks from which assistance could be secured. In the event such a run was started, it was certain that the bank would be wrecked. The directors could not be held liable if such a belief was a mistake of judgment. Such belief, however, was absolutely justified by the circumstances and conditions that prevailed in this case. A stockholder is not required to give bond for any damage that may result by reason of the wrongful bringing of an action against a bank and would have been exempt from any liability for

wrongful or false charges or misstatements contained in his complaint, as at that time there was no law in Alaska relating to the circulation of false reports concerning a bank. Consequently, the directors were compelled to take some effective action. From the testimony it stands uncontradicted that the directors had no reason to believe the bank was not in a perfectly solvent condition (p. 214). The directors were then confronted with a condition that must be met immediately. They had a right to rely upon the statement of one of their number, who had been a director from the inception of the bank, that he had a purchaser for said stock, especially when it was offered at \$4,000 less than par, and they voted to extend a loan to the purchaser for the purpose of purchasing the stock and to hold said stock as collateral. The directors are not charged with making a bad loan. They had a perfect right to accept the stock as collateral. No contention has been made that they acted in bad faith. Until the purchaser could be secured, a temporary arrangement must be made, in order to secure the money. The bank having refused absolutely to purchase the stock, the money was loaned to F. W. Hawkins, who gave his note therefor. The uncontradicted evidence shows that without the knowledge of the directors said Hawkins canceled the note and surrendered the stock into the treasury. The Court cannot presume that the directors intended the transaction as a purchase of the stock and the loan of

the money to the cashier as a mere subterfuge, when the evidence conclusively and undisputedly shows that was not the intention, and there is no evidence to show any bad faith on the part of any of the directors. There was a breach of duty on the part of the cashier, and had it been reported to the directors, they might still have been able to secure a purchaser if the one in view did not take the stock. There is nothing in the record to show that the directors did anything except what they considered for the very best interests of the bank, and all that was done was for the purpose of protecting the interests of the stockholders and all of the creditors of the bank.

Directors of a corporation are justified in purchasing its stock for the corporation where the object is to protect the company by getting rid of a stockholder whose acts are detrimental to its interests.

A well considered case is the case of *Copper Belle Mining Co. v. Costello*, 95 Pac., 94, in which it was held that:

“A purchase by a mining corporation of its own stock is valid, as against the corporation, where made in the discretion of the officers of the corporation, in good faith, and in the exercise of their control of the affairs of the corporation, for the purpose of getting rid of a superintendent whose management was believed to be injurious, and where it does not appear that at the time of pur-

chase the corporation was insolvent, or that any of its officers or stockholders had reason so to believe."

Although the English decisions are uniformly against the purchase of its own stock by a corporation, they permit an exception to their rule for the purpose of securing harmony and adjusting differences between stockholders and officers of the bank.

In the case of *In re Dronfield Silkstone Coal Co.*, L. R., 17, Chancery Div., 76, 50 L. J. Ch., N. S., 347, differences had arisen between the company and one of its directors as to the mode of conducting its business, which resulted in the retirement of the director and purchase by the company of his shares of stock. The by-laws of the corporation contained no clause authorizing the company to purchase its shares of stock, but the articles of association contained a broad provision authorizing the company so to do, and while the Court held that such article could not legally authorize the company to embark in the traffic of its own capital stock, a business not authorized by the law, it validly authorized the company to purchase its own shares under the circumstances arising in this case, as such purchase was not made with the intention of trafficking in its own stock, though profit might incidentally arise in a resale of the shares.

We respectfully submit that under the critical conditions presented by McGinn's act, no action of the board could have been more laudable and no employ-

ment of the bank's funds more legitimate than their use to facilitate the elimination of McGinn and thereby possibly save the very life of the bank itself.

ASSIGNMENT OF ERROR NO. 3—OVER-VALUATION OF THE GOLD BAR STOCK.

There are other matters included in this assignment, but as they are repeated under succeeding assignments we shall only consider the Gold Bar stock here.

The exception is to the conclusion of law that John A. Jesson, James W. Hill and R. C. Wood are not jointly and severally liable for over-valuation of the Gold Bar stock in the sum of \$75,000.00, that this conclusion is contrary to the evidence, contrary to the facts found and contrary to law (p. 218).

The only findings on this subject were:

"That among the other assets of said partnership so accepted by said officers and directors was four-fifths of the capital stock of the Gold Bar Lumber Company, a corporation existing in the State of Washington, which said stock was accepted and paid for at the valuation of \$341,049.00, and said stock was at all times during the existence of said corporation carried as an asset in said sum" (p. 182).

"That at the time said investment was so made as aforesaid, said Lumber Company was closed down, and immediately prior to closing down, it has been operated at a loss, that in so far as said Lumber Company was able to operate since the purchase of said stock by said corporation, all of

its earnings and a part of its surplus have been expended in the purchase and repair of equipment for said mill, and in the operation of said mill its standing timber was being consumed and its best asset exhausted. That no dividends have ever been paid on the capital stock of said lumber company during the time the same was owned by said bank" (p. 187).

The Court in its opinion said:

"Whatever subsequent events may have shown to be the actual value of the assets taken over, it has not been shown, by the evidence given in this case, that there was any actual fraud in the determination of the value placed upon such assets by the directors in March, 1908. The evidence rather shows that such value was placed upon these assets by the stockholders themselves acting through their committee, and that the resolution of the stockholders of March 12, 1908, authorizing the directors to take over such assets, contemplated only the execution of the formal papers necessary for the transfer, rather than that the directors should exercise their individual judgments in determining the value of such assets" (No. 2528, pp. 1211-1212).

A mere reading of the findings quoted shows that there was no warrant for the conclusion that the Gold Bar stock was over-valued in the sum of \$75,000 or any other sum.

ASSIGNMENT OF ERROR NO. 4—PURCHASE OF TANANA
ELECTRIC COMPANY NOTES, \$27,997.38.

Assignment No. 4 reads in part as follows:

“The Court erred in denying that portion of Conclusion of Law No. 1, which is as follows:

“ ‘Purchase of Tanana Electric Company notes \$27,997.38’ ” (p. 229).

Appellant claims that this Conclusion of Law is contrary to the facts found.

The transaction relates to the original purchase of the assets of the partnership by the corporation.

The findings were:

“That of said notes so past due as aforesaid, there were two executed by the Tanana Electric Company in the sum of \$27,997.38 which depended for their value upon the existence of an alleged guaranty of the Scandinavian-American Bank to make advancements sufficient to cover the same; that said alleged guaranty never had any existence in fact, and the claim therefor had been repudiated by said Scandinavian-American Bank prior to the time said note was accepted by said Board of Directors, and said repudiation was known to the members of said board. That said notes are still unpaid, and the same was at all times carried on the books of the said Washington-Alaska Bank, formerly Fairbanks Banking Company, as an asset in the sum of \$27,997.38” (p. 181).

“That said Board of Directors and the officers of said bank accepted said notes of the Tanana Electric Company and paid therefor the sum of \$27,997.38, with knowledge on the part of each of

them that the same depended for their value upon said alleged guaranty alone" (p. 182).

These should be considered in connection with the opinion of the Court,

"Whatever subsequent events may have shown to be the actual value of the assets taken over, it has not been shown, by the evidence given in this case, that there was any actual fraud in the determination of the value placed upon such assets by the directors in March, 1908. The evidence rather shows that such value was placed upon these assets by the stockholders themselves, acting through their committee, and that the resolution of the stockholders of March 12, 1908, authorizing the directors to take over such assets, contemplated only the execution of the formal papers necessary for the transfer, rather than that the directors should exercise their individual judgments in determining the value of such assets" (No. 2528, p. 1211).

On our direct appeal No. 2528, we challenge the findings of court above set out in relation to the Tanana Electric Company notes and to the argument in support of our position there taken we respectfully refer the Court (See Appellant's Brief No. 2528, p. 131).

As the Court states in its opinion, there is no finding of the Court that the purchase of these Tanana notes was in any way tainted with fraud. The transaction was one involving the issue of stock and under the Nevada law the judgment of the directors in the absence of fraud was conclusive upon the corporation.

ASSIGNMENT OF ERROR NO. 5—PURCHASE OF OTHER
NOTES PAST DUE FROM THE PARTNERSHIP
OF \$41,911.56.

Assignment of Error No. 5 is as follows:

“To the denial of that portion of plaintiff’s proposed Conclusions of Law Number 1 which is as follows: ‘Purchase of other notes past due, from the partnership of \$41,911.56,’ plaintiff duly excepted at the time and still excepts for the reason that the same is contrary to the facts found by the Court, and contrary to law” (p. 219).

This also relates to the original acquisition of the assets of the partnership by the corporation.

The findings were:

“That of the loans and discounts transferred by said partnership to said corporation a large amount were then past due, of which past due paper the sum of \$69,908.94 now remains in the hands of the receiver unpaid and uncollectible, which said loans and discounts were accepted by the directors of said corporation at their face value, and the same were included in those on which the accrued interest referred to in said resolution was afterward computed” (p. 181).

“That of the notes accepted from said partnership as aforesaid and paid for by said corporation, there were charged on December 31, 1907, by said partnership on the books of said partnership to an account known as ‘doubtful account’ the sum of \$22,979.99 and said doubtful account, so including said notes in said amount, was then depreciated on the said books to the amount of thirty-

three and one-third per cent. thereof, which said notes were accepted by said corporation and paid for by them in the amount aforesaid, to wit, \$22,-979.99, all of which said notes were then past due, and of which there still remains unpaid and uncollectible the sum of \$12,860. That of said notes so charged to said doubtful account as aforesaid, there was on December 31, 1909, charged by said corporation to the account of profit and loss on the books of said corporation the sum of \$12,-192.80" (p. 185).

The Court said in this regard:

"While considerations other than the issuing of stock were paid to the partnership, the whole transaction was essentially one involving the issue of stock of the corporation for property, and the law of Nevada, under which the corporation was organized, and by which the liability of the defendants must be determined, provides:

"'Any corporation existing under any law of this State may issue stock for labor done, or personal property, or real estate or leases thereof; in the absence of fraud in the transaction, the judgment of the directors as to the value of such labor, property, real estate or leases shall be conclusive.'

"The directors at that time appear to have been acting in good faith, and to have invested considerable sums of their own money in the stock of the corporation, and subsequently to have left, in addition, considerable sums of money on deposit with the new bank. While it may be that the fact that such a large part of the notes taken over were past due should have shown that such paper was an undesirable asset for a bank, there is no evidence that the directors at that time did not honestly believe it to be worth the valuation placed upon it" (No. 2528, pp. 1212-1213).

There was no finding that the notes were not worth their face value at the time they were taken over. They must be presumed to have been so in the absence of a finding to the contrary.

ASSIGNMENTS OF ERROR NOS. 6 AND 7—ACCRUED INTEREST ON PARTNERSHIP NOTES PAID TO BARNETTE, HILL AND WOOD, AND WHICH WAS NOT COLLECTED, \$7500.00, AND BALANCE OF ACCRUED INTEREST PAID BARNETTE, HILL AND WOOD ON PARTNERSHIP NOTES PURCHASED, \$32,142.81.

Assignments of Error Nos. 6 and 7, are as follows:

“To the denial of that portion of plaintiff’s proposed Conclusions of Law Number 1 which is as follows: ‘Accrued interest on partnership notes paid to Barnette, Hill and Wood, and which was not collected, \$7,500.00,’ plaintiff duly excepted at the time and still excepts for the reason that the same is contrary to the facts found by the Court and contrary to law” (p. 219).

“To the denial of that portion of plaintiff’s proposed Conclusions of Law Number 1, which is as follows: ‘Balance of accrued interest paid to Barnette, Hill and Wood on partnership notes purchased, \$32,142.81,’ plaintiff excepted at the time and still excepts for the reason that the same is contrary to the facts found by the Court, and contrary to law” (p. 219).

The findings were:

VIII.

"That said committee met on the 5th day of January, 1908, and, after investigating the affairs of the bank, made the following report to be presented for the consideration of the proposed new corporation" (p. 174).

"(f) That all interest on existing loans as of December 19, 1907, be computed to February 15, 1908, and that the amount of such accrued interest be placed to the credit of the old institution on the books of the new corporation, and that the same be payable on or before December 31, 1908" (p. 175).

XIV.

"Thereafter, on March 12, 1908, at a meeting of the Board of Directors, said matter was considered by them and the resolutions of the proposed stockholders, set out in Finding VIII hereof, were by said directors adopted and approved, except that the resolution providing for the payment of accrued interest up to February 15, 1908, was by them amended so as to read 'March 15, 1908'" (p. 178).

"XXXVI.

"That on March 23, 1908, pursuant to said resolution of the said Board of Directors adopted on March 12, 1908, the accrued interest on said loans so transferred to said corporation was computed to March 15, 1908, in the sum of \$39,642.81, and one-half thereof was placed to the credit of said Bar-

nette, and one-fourth thereof each to the credit of said Hill and Wood on the books of said corporation, and subsequently the same was paid to said Barnette, Hill and Wood in cash."

"XXXVII.

"That of said interest so paid to said Barnette, Hill and Wood as aforesaid, approximately \$7500.00 thereof was never collected by said bank" (pp. 185-186).

The opinion of the Court says:

"Whatever may be said of the rights and liabilities of Wood, under the written agreement of March 16, if this were still an executory agreement, it seems that now, the agreement having been fully executed, in accordance with what was then the understanding of all the parties, and cash, in place of stock, delivered to Wood, the receiver is not now in a position to set aside this executed contract, and to enforce the terms of the written contract, although such written contract varies, in some respects, from the one actually carried out by the parties. It would seem that the same reasoning should apply to the item of \$39,000.00 interest accruing from December 31, 1907, to March 15, 1908, upon the paper of the partnership transferred to the corporation, and which was paid to Barnette, Hill and Wood by the corporation on December 31, 1908. The minutes of the meeting on January 5, contemplate that interest accruing from December 31, 1907, to February 15, 1908, should be paid to the partnership; and it was also contemplated at that time that the business of the partnership should be taken over by the corpora-

tion on February 15. It was impossible, however, for the actual transfer to be made until March 15, and in view of all of the transactions between the parties, it seems that their intention was that the accruing interest, after December 31, 1907, until such time as an actual transfer of business should be made, should belong to the partnership rather than the corporation" (No. 2528, pp. 1210-1211).

It should be borne in mind that as far as the defendants Hill and Wood are concerned they were neither of them directors of the corporation at the time when the assets were taken over. They are charged with liability as being officers of the corporation but the mere fact that they were officers would not charge them with liability unless some specific breach of duty on their part was urged and proven.

There is no allegation that there was any fraud or imposition in connection with this transaction and there is no finding that there was any fraud or any conspiracy to defraud the bank. The fact that some of the accrued interest which was paid to Barnette, Hill and Wood was not collected subsequently by the bank, has no bearing on this transaction if it was in fact clear and free from fraud at the time it took place.

ASSIGNMENT OF ERROR NO. 8—SURRENDER OF WOOD'S
STOCK \$13,000.00.

Assignment of Error No. 8 is as follows:

"To the denial of that portion of plaintiff's proposed Conclusions of Law number one, which is as follows: 'Surrender of Wood's stock, \$13,000.00,' plaintiff duly excepted at the time and still excepts for the reason that the same is contrary to the facts found by the Court, and contrary to law" (p. 219).

These are the facts as found:

"That said committee [of the proposed incorporators] met on the 5th day of January, 1908, and, after investigating the affairs of the bank, made the following report to be presented for the consideration of the proposed new corporation (p. 174): . . .

"(g) That should James W. Hill and R. C. Wood not take the full forty-four thousand dollars in stock in the new corporation, the balance of the amount not so taken to be paid to them not later than July 1st, 1908" (p. 175).

"That on the 16th day of March, 1908, a written agreement was entered into between said corporation and said partners, and on the same day the same was signed by the said Barnette and Hill, and also on behalf of said bank by its president and secretary, wherein the valuation of the resources of said partnership was fixed at \$790,940.31 and its liabilities at \$538,940.31, leaving an excess of \$252,000.00 belonging to the said Barnette, Hill and Wood, in which said agreement the said Barnette, Hill and Wood agreed to accept stock

of the corporation at its par value for the amount of assets in excess of said liabilities, except that \$200,000 thereof should be placed to the credit of the said Barnette as a special deposit with said corporation upon the terms therein stated. By the terms of said agreement the amount of stock to be issued to Barnette, Hill and Wood, was fixed at \$52,000.00 instead of \$88,000.00 as contemplated by said resolution and subscription, thus entitling Barnette to 260 shares and Wood and Hill each to 130 shares, a copy of said agreement is annexed to plaintiff's complaint and marked 'Exhibit One' " (pp. 178-179).

"That at the time said written agreement was signed and executed, and during all of the negotiations leading up to the making of the same, the defendant Wood was in Seattle, Washington, but he was advised duly concerning the same by the defendant Hill by letter and by telegram" (p. 180).

"That prior to the return of said Wood to Fairbanks, to wit, on the 29th day of February, 1908, he offered to sell his stock in said corporation and to take in payment therefor part cash and a note for the balance, to be secured by said stock as collateral security" (p. 180).

"That the defendant Wood returned to Fairbanks some time in the month of April, 1908, and, upon his return, he signed said written agreement so entered into as aforesaid, knowing that the same contained said clause requiring him to take stock for his share of the assets of said partnership so transferred to said corporation in excess of the liabilities thereof as aforesaid, and also knowing that the same did not provide for the payment of said accrued interest" (p. 181).

"That the said Wood accepted said office of cashier while in the said City of Seattle, and, on the 16th day of March, 1908, entered upon the discharge of his duties as such cashier, and, upon his return to said Fairbanks in April, 1908, as aforesaid, entered actively upon such duties and continued to so act until June 29, 1908, when he tendered his resignation as such cashier, and the same was accepted by the Board of Directors to be effective at the close of business on June 30, 1908, and one B. R. Dusenbury, who was then assistant cashier, was elected to succeed Wood as cashier" (p. 182-183).

"That at the time said Wood tendered his resignation as cashier as aforesaid, he demanded that there be paid to him the amount of his interest in said partnership assets, to wit, \$13,000" (p. 183).

"That a certificate for 130 shares of the capital stock of said corporation had been written up in the name of the defendant Wood, of the par value of \$13,000, but the same was never detached from the stock book. That said 130 shares were carried on the books of said bank as outstanding stock from March 16, 1908, to June 30, 1908" (p. 183).

"That on the 30th day of June, 1908, with the knowledge, consent, and approval of the officers and directors of said bank a certificate of deposit was issued to and accepted by the said Wood in the sum of \$13,000, in lieu of said stock, which said certificate was signed by the said R. B. Dusenbury as assistant cashier prior to when the said resignation of the said Wood, as cashier became effective, and said shares of capital stock were

on the same day charged to treasury stock on the books of said bank" (p. 183).

"That subsequently the said Wood drew out in cash from the funds of said bank the amount of the said certificate of deposit, to wit, \$13,000" (p. 183).

As a conclusion of law from these findings the plaintiff proposed the following:

"The defendants John A. Jesson, James W. Hill and R. C. Wood are jointly and severally liable for the following items . . . Surrender of Wood's stock. . . \$13,000."

The Court denied this request and plaintiff assigns the ruling as error (p. 229).

The opinion of the Court is as follows:

"Wood was absent from Fairbanks during all of this time, and did not return until about the middle of April, 1908, and it seems that at this time the agreement with the corporation was signed by him, his name having been signed to the stock subscription list on his behalf by BARNETTE. He testifies that it was distinctly understood between him and the directors at the time he did sign the agreement, that he should have the right to take cash, instead of the par value of the shares subscribed for, on July 1st, and that as evidence of such understanding there was then shown him the report of the committee of January 5th, and the minutes of the corporation, wherein this was set forth. Prior to his returning to Fairbanks, he had performed some acts as cashier of the corporation in Seattle, and he continued to

act as such cashier until June 30th. On June 29th, he tendered his resignation, and on July 1st, was paid \$13,000.00, the par value of the stock allotted to him. The certificates for this stock seem never to have been in his possession, but to have remained undetached in the stockbook of the corporation. *Whatever may be said of the rights and liabilities of Wood, under the written agreement of March 16th, if this were still an executory agreement, it seems that now, the agreement having been fully executed, in accordance with what was then the understanding of all the parties, and cash, in place of stock, delivered to Wood, the receiver is not now in a position to set aside this executed contract, and to enforce the terms of the written contract, although such written contract varies, in some respects, from the one actually carried out by the parties"* (No. 2528, pp. 1210-1211).

The legal questions bearing upon the receiver's right to recover the \$13,000.00 paid to the defendant Wood are fully discussed in our reply brief in case No. 2594, this being the action brought by the receiver against Wood individually to recover this same \$13,000.00.

We respectfully refer the Court to that brief and the authorities cited in support of the following propositions.

1st: That the transaction did not constitute a purchase by the bank of the Wood's stock but was rather a re-taking of stock pursuant to an agreement made at the time of the subscription by Wood, which sub-

scription was conditional, the condition being that he should have the right to take cash in lieu of the stock at any time up to July 1, 1908.

2nd: That the transaction being an executed agreement cannot now be set aside.

3rd: That the receiver must show that he represents creditors who were such at the time the transaction occurred.

ASSIGNMENT OF ERROR NO. 10.

This refers to the McGinn stock already considered under Assignment of Error No. 2.

ASSIGNMENT OF ERROR NO. 11—INTEREST FOR ONE YEAR ON AMOUNT INVESTED IN STOCK OF FIRST NATIONAL BANK AND SOLD TO MCGINN AND WOOD \$10,000.00.

The facts found were:

"That in the month of May, 1909, said Fairbanks Banking Company and the Washington-Alaska Bank of Washington, then doing business at Fairbanks, each purchased one-half of the capital stock of the First National Bank of Fairbanks, Alaska, for which each paid the sum of \$62,500.00 and continued to own and hold said stock until the month of May, 1910.

"That on or about the 4th of May, 1910, said Fairbanks Banking Company sold the entire capital stock of the said First National Bank to the defendants Wood and McGinn for the sum of \$125,000.00 and received said amount in payment

therefor, delivering to them the said capital stock of said First National Bank.

"That at the time said banks purchased said stock of the First National Bank, they gave to said Wood an option to purchase the same on or before June 1, 1910, for the sum of \$125,000.00, and said sale to said Wood and McGinn was made in pursuance to said option.

"That neither the said Fairbanks Banking Company, nor the said Washington-Alaska Bank of Washington, received any dividend on said stock of the said First National Bank during the time the same was held and owned by them, nor did they, or either of them, receive any interest from the said Wood and McGinn, or from anyone in their behalf, for the money invested in said stock during the time the same was so invested" (pp. 193-194).

Appellant requested the court to find as a conclusion of law from these findings that the defendants J. A. Jesson, R. C. Wood, John L. McGinn and Ray Brumbaugh, are jointly and severally liable for one year's interest upon the amount invested in the stock of the First National Bank and sold to McGinn and Wood (p. 1206).

The Court denied this request and the ruling is assigned as Assignment of Error No 11.

The Court said in its opinion:

"Nor is it apparent from the evidence upon what basis any damages can be claimed against the directors, on account of their transactions with the stock of the First National Bank. This stock was acquired in May, 1909, and at the same time an

option was given to Wood to purchase it at the same price in May, 1910, and it was on this latter date sold to him for this price; so that there was no actual loss from the transaction, except that during this time the funds of the bank were tied up in the stock, and no returns realized therefrom. There was evidence tending to show that it was an advantage to the Fairbanks Banking Company to have control of the First National Bank during this time, as it thus prevented competition in the purchase of gold-dust. There was no evidence as to the earnings of the First National Bank during the time its stock was carried by the Fairbanks Banking Company, nor any evidence that it was worth more at the time that it was sold than at the time when it was purchased; nor any evidence that the option given at the time of the purchase for a resale was illegal or fraudulently entered into by the directors" (No. 2528, pp. 1215-1216).

There is nothing in these findings which is inconsistent with the most complete innocence of any wrong-doing on the part of all concerned. "Fraud is odious and will not be presumed."

There may have been a dozen reasons why the Bank desired to get the First National Bank stock out of the hands in which it was at the time, and into friendly hands, and if Wood and McGinn, or any one else were to take it off the Bank's hands, they would certainly have had to have sufficient time to raise the large sum of money involved and a year was not unreasonable.

During the interim, the bank was spared competi-

tion in the purchase of gold dust and there may have been other considerations influencing it.

It must be borne in mind that there is no claim that the appellees, Wood and McGinn, controlled the bank. There were twelve directors who were in control and there is nothing in the findings to imply the slightest bad faith on the part of any one concerned.

ASSIGNMENTS XII TO XXI.

The remaining assignments go to the points already discussed.

THE DECREE SHOULD BE AFFIRMED ON THE RECORD BEFORE THE COURT.

Under the law of Alaska all issues of fact and actions of an equitable nature may be tried by a court in all such actions. The Court in rendering its decision therein shall set out in writing its findings of fact *upon all the material issues of fact presented by the pleadings, together with its conclusions of law thereon . . .* and such findings of fact shall have the same force and effect, and be equally conclusive as a verdict by a jury in an action.

Compiled Laws, Sec. 1204;

Carter Code, Sec. 372.

One of the principal grounds of defense of this action was that the torts complained of had been sat-

ified and the liability of the defendants released by the release of their joint tort-feasor E. T. Barnette. This issue is plainly presented by the record under the amended answer of defendants, Jesson et al. (p. 114), the answer of defendants Wood, Healey and McGinn (p. 67), and the replies thereto (pp. 157, 162).

There is no finding whatever upon the issue thus presented, notwithstanding the requirement of the Alaska Statute that the court must set out its findings of fact *upon all material issues*. The appellant does not challenge the failure of the court to find upon those issues. Where there is no finding upon the issue, it must be presumed in favor of the judgment that the evidence sustained the decision.

James v. Williams, 31 Cal., 211;

Sears v. Dixon, 33 Cal., 327;

Shelby v. Houston, 38 Cal., 410;

Steinback v. Krone, 36 Cal., 303;

Lovell v. Frost, 44 Cal., 471;

Smith v. Cushing, 41 Cal., 97;

Emmal v. Webb, 36 Cal., 197;

More v. Lott, 13 Nev., 380;

Warren v. Quill, 9 Nev., 264.

ACCORD AND SATISFACTION.

To all the alleged claims herein made the defendants interposed the defense that there had been a satisfaction in whole or in part by reason of an accord and satisfaction between Barnette and the receivers. The question is fully discussed in our brief No. 2528, pp. 155.

We desire, however, to bring to the attention of the Court the following additional authorities bearing upon those questions:

As a person who has received an injury from the wrongful act of others is entitled to receive but one satisfaction therefor it necessarily follows that an accord and satisfaction from one of several joint wrongdoers is a satisfaction as to all.

1 *Corpus Juris.*, 536.

In *Snyder v. Witt*, 99 Tenn., 618, it was said:

"If defendants can be held liable at all under the facts in this case, it can only be on the theory that they are joint tort feasers with Griffin and the only question that remains necessary to be considered is whether the accord and satisfaction by the joint tort feaser Griffin operated to discharge these defendants also."

It was held that it did. The accord and satisfaction occurred through the settlement of another suit brought by plaintiff against Griffin.

In an action against several persons for a joint trespass and an injury to plaintiff, if he receive money in satisfaction of the wrong done to him by the party paying him, it is satisfaction as to all the defendants and they are thereby discharged of all liability to plaintiff whether the parties designed it or not.

Brown vs. Kenchelos, 3 Cold (Tenn.), 192.

The intention of the parties is to be arrived at, and if it appears that the consideration for the release was not accepted by the releasor in full settlement of his claim the other tort feasons are discharged merely *pro tanto*.

Bell v. Perry, 43 Ia., 368;

Meixell v. Kirkpatrick, 29 Kan., 684;

McCrillis v. Hawes, 38 Me., 568;

Irvine v. Milbank, 15 Abb. Pr., N. S., 378;

Matthews v. Chicopee Mfg. Co., 3 Robt. (N. Y.), 711;

Sloan v. Herrick, 49 Vt., 328;

Bloss v. Plymale, 3 W. Va., 393;

Pogel v. Meilke, 60 Wis., 250;

Snyder v. Mutual Telephone Co., 135 Ia., 215;

Bailey v. Delta Elect. L. Co., 86 Miss., 634.

In *Knox v. Work, Browne* (Pa.), 101, it was held that:

“If there be neither a recovery against one of the trespassers, nor a release to one of them, and it

be a matter of doubt whether plaintiff has settled with one of them it should be left like every other fact to the jury."

Acceptance of a partial satisfaction from one joint tortfeasor is a *pro tanto* discharge of the others.

Knapp v. Roche, 94 N. Y., 329;

Chamberlin v. Murphy, 41 Vt., 110.

The amount paid by the tortfeasor released is to be deducted from the total amount of the plaintiff's damages in determining the amount of the liability of the other *tortfeasors*.

Judd v. Walker, 158 Mo. App., 156;

Gretjens v. N. Y., 145 App. Div., 640;

St. Louis R. Co. v. Bass, 140 S. W., 860;

Button v. Louisville, 118 S. W., 977;

Musolf v. Duluth, 108 Minn., 369, 24 L. R. A. N. S., 451.

In *Heyer v. Carr*, 6 R. I., 45, the action was trover against two for a joint conversion. The plaintiffs obtained judgment against one and then withdrew their action against the other upon receiving from him partial satisfaction for the wrong and agreeing no further to prosecute him therefor. *Held*, that damages might be assessed against the defaulted defendant for the value of the goods converted, with interest from the time of conversion, *deducting therefrom the amount re-*

ceived from his co-defendant, by way of compromise for his liability.

From the foregoing considerations we respectfully submit that the decree should be affirmed as to the matters presented on this cross appeal.

JOHN L. MCGINN,
A. R. HEILIG,
Attorneys for Appellee.

METSON, DREW & MACKENZIE,
CURTIS HILLYER,
CHAS. J. HEGGERTY,
Of Counsel.

United States
Circuit Court of Appeals

For the Ninth Circuit.

F. G. NOYES, as Receiver of WASHINGTON-
ALASKA BANK, a Corporation,
Appellant,
VS.

R. C. WOOD,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Territory of Alaska, Fourth Division.

Filed

JUL 1 - 1916

F. D. Monckton,

Clerk.

United States
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F. G. NOYES, as Receiver of WASHINGTON-
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court for the Territory of Alaska,
Fourth Division.*

1894.

F. G. NOYES, Receiver of the Washington-Alaska
Bank, a Corporation, Organized Under the
Laws of the State of Nevada,

Plaintiff,

vs.

R. C. WOOD,

Defendant.

Names and Addresses of Attorneys of Record.

O. L. RIDER, Venite, Oklahoma,

R. F. ROTH, Fairbanks, Alaska,

Attorneys for Plaintiff and Appellant.

JOHN L. MCGINN, Keystone Apartments,
San Francisco, California,

A. R. HEILIG, Fairbanks, Alaska,

Attorneys for Defendant and Appellee.

[1*]

[Title of Court and Cause.]

Stipulation as to Printing of the Record.

It is hereby stipulated and agreed that in the printing of the record herein for the consideration of the Court on appeal, that the title of the court and cause in full on all the pages shall be omitted except on the first page, and inserted in place and stead therein "Title of Court and Cause."

*Page-number appearing at foot of page of original certified Record.

Dated at Fairbanks, Alaska, this 24th day of February, 1915.

R. F. ROTH,

Attorney for Plaintiff.

A. R. HEILIG,

JOHN L. MCGINN and

Attorneys for Defendant.

[Indorsed]: No. 1894. In the District Court for the Territory of Alaska, Fourth Division. F. G. Noyes, Receiver, &c., Plaintiff, vs. R. C. Wood, Defendant. Stipulation as to Printing Record. Filed in the District Court, Territory of Alaska, 4th Div. Feb. 24, 1915. Angus McBride, Clerk. [2]

[Title of Court and Cause.]

**Praeipice Indicating Portions of the Record to be
Incorporated Into the Transcript on Appeal.**

To the Clerk of said Court:

Please prepare transcript of record on the appeal of the plaintiff in the above-entitled suit, and incorporate therein the following portions of said record only, to wit:

1. Complaint of plaintiff, filed on the 5 day of April, 1914.
2. Answer of the defendant, filed on the 2 day of June, 1914.
3. Reply of the plaintiff, filed on the 4 day of June, 1914.
4. Findings of Fact and Conclusions of Law, filed on the 6 day of July, 1914.
5. Judgment and Decree, filed on the 6 day of July, 1914.

6. Plaintiff's bill of exceptions, filed on the 6 day of July, 1914.
7. Order settling plaintiff's bill of exceptions, filed on the 6 day of July, 1914.
8. Petition for appeal, filed on the 28 day of Jan., 1915.
9. Order allowing appeal, filed on the 28 day of Jan., 1915.
10. Assignment of errors, filed on the 28 day of Jan., 1915.
11. Bond on appeal and order approving same, filed on the 20 day of February, 1915.
12. Citation and service thereon, filed on the 28 day of Jan., 1915. [3]
13. Order extending return day and time for docketing said cause on appeal, filed on the 20 day of Feb., 1915.
14. Stipulation for printing transcript, filed on the 24 day of Feb., 1915.
15. Praecipe for transcript, filed on the 28 day of Jan., 1915.

Signed this 9th day of September, 1914.

O. L. RIDER,

Attorney for Plaintiff.

[Indorsed]: F. G. Noyes, Receiver, etc., Plaintiff, vs. R. C. Wood, Defendant. Praecipe for Transcript. Filed in the District Court, Territory of Alaska, 4th Div. Jan. 28, 1915. Angus McBride, Clerk. [4]

[Title of Court and Cause.]

Complaint.

The plaintiff, for a cause of action against the de-

fendant, alleges and states:

(I)

The Washington-Alaska Bank, is, and ever since the 21st day of January, 1908, has been a corporation duly organized and existing under and by virtue of the laws of the State of Nevada. Said Washington-Alaska Bank was originally incorporated under the corporate name of "Fairbanks Banking Company," but afterward, on or about, or shortly prior to the 14th day of September, 1910, its name was, by amendments to its Articles of Incorporation, duly changed to Washington-Alaska Bank. The authorized capital stock of said corporation is and was at all times since its incorporation, \$300,000.00, divided into 3000 shares of the par value of \$100.00 each.

(II)

That for a long time prior to the 16th day of March, 1908, this defendant, together with E. T. Barnette and James W. Hill, were engaged in business at Fairbanks, Alaska, as copartners under the firm name and style of Fairbanks Banking Company, with an agreement and understanding between said copartners that the profits of said business should be divided as follows: one-half thereof to the said E. T. Barnette, and one-fourth thereof each to the said James W. Hill and this defendant. That on said 16th day of March, [5] 1908, it was claimed by said copartners that the assets of said business exceeded all liabilities of said partnership in the sum of \$252,000.00; and that, of said sum the said E. T. Barnette was entitled to \$200,000.00 as capital invested, and that the remaining \$52,000.00 as profits

belonged to said partners in the proportion above stated; that is to say, to E. T. Barnette, \$26,000.00; to James W. Hill \$13,000; and to this defendant, \$13,000.00

(III)

That prior thereto, to wit, in January, 1908, for the purpose of organizing the said Fairbanks Banking Company, a corporation, which should have as its object and be for the purpose of, among other things, the taking over and acquiring the business of said copartnership, the said copartners circulated and caused to be circulated, stock subscription lists subscribing to the capital stock of said corporation, which said stock subscription lists, omitting the signatures thereto, is hereto attached and marked "Exhibit One," and the same is made a part hereof by reference the same as if fully incorporated herein.

(IV)

That, as shown by said stock subscription lists, said copartners subscribed for shares of the capital stock of said corporation, as follows: E. T. Barnette, 440 shares; James W. Hill, 220 shares; and this defendant, R. C. Wood, 220 shares.

(V)

That after the organization of said Fairbanks Banking Company, a corporation, to wit, on March 12th, 1908, at a meeting of the Board of Directors of said corporation, this defendant was duly elected cashier thereof, and at the same meeting of said directors, a resolution of said directors was adopted as follows:

"That should James W. Hill and R. C. Wood not

take the full \$44,000.00 in stock in the new corporation the balance of the amount not so taken to be paid to them not later than July 1, 1908."

[6] which said resolution had been previously adopted at a meeting of the stockholders of said corporation held January 5th, 1908.

(VI)

It was further resolved at said meeting of said Board of Directors that the president and secretary of said corporation be instructed to issue 220 shares of the capital stock of said corporation to the said R. C. Wood, this defendant, in exchange for the property received by said corporation from said partnership, which said stock should be deemed fully paid; a copy of which resolution is as follows, to wit:

"It was moved by Mr. Robinson, seconded by Mr. Yarnell that the president and secretary be instructed to issue stock to E. T. Barnette, James W. Hill and R. C. Wood in exchange for the property received by the Fairbanks Banking Company, a corporation, as follows:

440 shares to E. T. Barnette.

220 shares to James W. Hill.

220 shares to R. C. Wood.

and that said stock be deemed fully paid in exchange for property received from said persons. Said stock being issued for the assets of the corporation upon which a valuation has been placed at \$288,000.00 in excess of its total liabilities, less \$200,000.00 the capital stock of the old bank, the personal property of E. T. Barnette. Carried."

(VII)

That afterwards, to wit, on March 16th, 1908, by a written agreement, hereinafter set forth, between said copartners, including this defendant R. C. Wood, and said corporation, a valuation was placed on the assets of said partnership in excess of its total liabilities, at \$252,000.00, instead of \$288,000.00, as stated in said resolution, of which said sum this defendant R. C. Wood, by virtue of said partnership agreement would be entitled to \$13,000.00.

(VIII)

That thereafter, to wit, on March 16, 1908, and for the purpose of effecting the transfer to it of the business of said copartnership upon the terms and conditions therein stated, the said copartners E. T. Barnette, James W. Hill and this defendant, R. C. Wood, entered into an agreement in writing, hereinbefore [7] referred to, with said Fairbanks Banking Company, a corporation, a copy of which said agreement is hereto attached and marked "Exhibit Two," and is made a part hereof by reference the same as if fully incorporated herein, by the terms of which said agreement said copartners, including this defendant, agreed to accept and said corporation agreed to issue to them in exchange for said partnership property, shares of the capital stock of said corporation in such amount as the assets of said copartnership should exceed its liabilities less the sum of \$200,000.00, which, by the term of said agreement amounted to \$52,000.00, of which said amount, under the agreement existing between said parties as aforesaid this defendant R. C. Wood was entitled to \$13,000.00.

(IX)

That the resolutions aforesaid and said written agreement became and were an offer on the part of said corporation and an acceptance thereof on the part of said defendant, respecting the purchase and sale of the interest of said defendant in said copartnership, in exchange for \$13,000.00 worth of the capital stock of said corporation, or 130 shares thereof.

(X)

That thereafter, to wit, on the 16th day of March, 1908, in pursuance of said resolutions and said written agreement there was issued in the name of this defendant, 130 shares of the capital stock of said corporation of the par value of \$100.00 per share, as evidenced by stock certificate number three, and the capital stock account on the books of said corporation was credited with the amount of said issue.

(XI)

That this defendant R. C. Wood entered upon the discharge of his duties as cashier of said corporation early in April, 1908, and continued to act as such cashier until the close of business on June 30th, 1908, and at the time he so entered upon such duties, and continuously thereafter until said June 30th, 1908, said issue of [8] capital stock so made to him as aforesaid, was outstanding on the books and records of said corporation, of which this defendant had knowledge at the time, or by the exercise of reasonable care and diligence could have acquired knowledge.

(XII)

That thereafter, to wit, on the said June 30th, 1908, and while this defendant was cashier of said corporation, he wrongfully, fraudulently, and in violation of the terms of said written agreement and of the rights of the creditors of said corporation as hereinafter set forth, cancelled or caused to be cancelled, said certificate of stock so issued to him as aforesaid, and made or caused to be made on the books of said corporation an entry charging the par value thereof, to wit, \$13,000.00, to the account of treasury stock, and at the same time issued or caused to be issued the certain certificate of deposit of said corporation, payable to himself in the sum of \$13,000.00, which said certificate of deposit this defendant the said R. C. Wood afterward cashed, by means whereof there was paid to him and by him withdrawn from the assets of said corporation the sum of \$13,000.00 in cash, and its issued capital stock reduced in a corresponding amount. That said certificate of stock was never reissued to any person but was thereafter continuously carried in the account of treasury stock on the books of said corporation.

(XIII)

This plaintiff further alleges that at the time said written agreement was entered into and said transfer made in exchange for said capital stock, the assets of said copartnership, less said sum of \$200,000.00, did not exceed its liabilities in the said sum of \$52,000.00 or in any sum whatsoever, all of which was well known to the defendant or by the exercise of ordinary care could have been known to

him, and said transfer of the capital stock of said corporation in said amount of \$13,000.00 to this defendant, in exchange for his pretended share in said excess of assets was without any [9] consideration whatsoever, and said withdrawal by this defendant of said sum of \$13,000.00 from the assets of said corporation by means of the surrender of said certificate of stock as aforesaid, was without consideration and was wrongfully and fraudulently done in violation of the terms of said written agreement and of the rights of the creditors of said corporation as hereinbefore stated.

(XIV)

That at the time this defendant surrendered the certificate of stock so issued to him as aforesaid and received therefor said certificate of deposit, to wit, on the 30th day of June, 1908, said corporation was in a grossly insolvent condition and its assets then were and are now insufficient to pay its liabilities in full, the exact amount of which has never been determined, which said insolvent condition was well known to this defendant, or by the exercise of ordinary care could have been known by him on said June 30th, 1908. That at all times thereafter the said Fairbanks Banking Company (which afterward, on or about September 14th, 1910, was known as the Washington-Alaska Bank, as aforesaid) was insolvent and in a failing condition, although continuing actively in business as a bank in the city of Fairbanks, Alaska, until and including January 4th, 1911, at which last-named date said Washington-Alaska

Bank, formerly called Fairbanks Banking Company, ceased business.

(XV)

That on said January 4th, 1911, said Washington-Alaska Bank had liabilities in excess of \$1,037,296.13, consisting of amounts due depositors, other than banks, of \$921,357.56, and amounts due banks in excess of \$115,938.57, and the assets of said Washington-Alaska Bank were then and still are insufficient to pay said liabilities in full, and said liabilities are now in excess of \$556,735.98. That at all the times herein stated, the assets of said Washington-Alaska Bank, including its capital stock, were a trust fund for the benefit of its creditors, and this defendant [10] by his wrongful and fraudulent acts herein complained of, gave to himself a preference over the other creditors of said corporation, and reduced said fund and deprived said creditors, and is now depriving them of the benefits thereof, in the amount so withdrawn by him as aforesaid, to wit, \$13,000.00, no part of which has been restored by this defendant or in any other manner whatsoever.

(XVI)

That on January 5th, 1911, in a certain suit entitled "Tanana Valley Railroad Company, a corporation, and John Zug, Plaintiffs, vs. Washington-Alaska Bank, a corporation, defendant," commenced in said district court for the Territory of Alaska, fourth division, an order was duly given and made appointing F. W. Hawkins receiver of said Washington-Alaska Bank, who thereupon duly qualified and entered upon his duties as such receiver. That

thereafter on the 6th day of January, 1911, said district court by an order duly given and made appointed E. H. Mack jointly with said Hawkins, receiver of said Washington-Alaska Bank, and said Mack thereupon duly qualified and entered upon his duties as such receiver, and thereafter said Hawkins and Mack continued to be and act as receivers of said Washington-Alaska Bank until the 12th day of May, 1911, when said Hawkins and Mack resigned as such receivers, and thereupon on said last-named date said district court by an order duly given and made and entered appointed this plaintiff F. G. Noyes receiver of said Washington-Alaska Bank, and said F. G. Noyes thereupon duly qualified and entered upon his duties as such receiver, and ever since has been and now is the duly qualified and acting receiver of said Washington-Alaska Bank, and as such is plaintiff in this suit. That on the 8th day of May, 1912, and on the 31st day of March, 1913, said district court by orders duly made and entered, authorized and directed this plaintiff, receiver as aforesaid, to demand repayment for all stock surrendered by the stockholders of said corporation, including [11] that of this defendant and to enforce the same by suit if necessary. That on the 10th day of May, 1912, and again on the 4th day of April, 1913, in pursuance to said orders demand was made of this defendant for such repayment and by him refused.

(XVII)

The receiver of said Washington-Alaska Bank has collected and reduced to cash as far as possible the assets of said Washington-Alaska Bank, and

there has been declared and paid upon the acknowledged or proven liabilities of said bank, dividends aggregating fifty per cent, save and except that \$5469.82 of said dividends have not been called for, and approximately \$12,000.00 thereof which has been withheld by order of Court, and save also that to the Dexter Horton National Bank of Seattle to whom there has been paid thereon \$25,000.00, and that other creditors holding claims aggregating \$2072.14 have either not proven their claims or yet demanded their dividends.

(XVIII)

At the time said Washington-Alaska Bank ceased business, on January 4th, 1911, there was due and owing from said Washington-Alaska Bank to the said Dexter Horton National Bank of Seattle the sum of \$129,465.62, and the said Dexter Horton National Bank had in its possession all of the capital stock of the said Gold Bar Lumber Company referred to in "Exhibit Two" hereto attached and belonging to the said Washington-Alaska Bank, and said Dexter Horton National Bank claimed to hold said stock in said Gold Bar Lumber Company as collateral security to secure the payment to said Dexter Horton National Bank of said sum of \$129,465.62, now approximately \$104,465.62, and said Dexter Horton National Bank still has possession of said stock in said Gold Bar Lumber Company, and still so claims to hold the same as such collateral security for the amount so due it as aforesaid.

(XIX)

That at all times since the organization of said

Fairbanks [12] Banking Company, a corporation, afterward known as the Washington-Alaska Bank, as aforesaid, the sum of \$341,949.00 of its assets have been invested in the stock of the said Gold Bar Lumber Company, and said stock constituted a book asset of that amount when said Washington-Alaska Bank ceased business, and is still, subject to the claim made by Dexter Horton National Bank of Seattle, an asset of said Washington-Alaska Bank. Said F. G. Noyes as receiver of the Washington-Alaska Bank, plaintiff, owing to the fact that said stock in said Gold Bar Lumber Company is so held and claimed by said Dexter Horton National Bank, has been unable to sell or dispose of the same, and although he has made diligent attempt has been unable to obtain for said stock in said Gold Bar Lumber Company any offer in excess of \$132,000.00, and plaintiff alleges that if said stock in said Gold Bar Lumber Company, so belonging to said Washington-Alaska Bank, has any value in excess of \$132,000.00 it is of a wholly uncertain and speculative character.

(XX)

The only remaining assets of said Washington-Alaska Bank in said receiver's hands, out of which any further dividends to depositors and other creditors can be paid, are bills and notes and overdrafts due from various persons and corporations, of the face value of \$217,933.49; real estate and furniture and fixtures carried on the books of said corporation at \$46,605.88; stock in the Chena Milling, Smelting & Refining Company of the par value of \$1,000.00, and a claim against the Scandinavian-American

Bank of Seattle for \$17,886.05 in litigation. That said bills, notes and overdrafts, although of the face value of \$217,933.49, are not of that value. The whole amount thereof are past due and not to exceed approximately \$25,000.00 thereof are owing from solvent debtors or can be collected and the remainder thereof are bad, worthless and uncollectible. Said real estate, furniture and fixtures are not of the actual cash or market value of more than \$25,000.00 and said stock in said Chena Milling, Smelting & Refining Company has no actual or market value.

[13]

(XXI)

That by the laws of the State of Nevada under and by virtue of which the said Fairbanks Banking Company, a corporation, was incorporated, it is provided:

“Sec. 30. Every corporation in this state shall also have the power, whenever at any assessment sale of the stock of said corporation or sale for unpaid subscription or call no person will take the stock and pay the assessment, or amount unpaid and due thereon and costs, to purchase such stock and hold the same for the benefit of the corporation. All purchases of its own stock by any corporation in this State which have been previously made at assessment sales whereat outside parties have failed to bid, and which purchases were for the amount of assessments due, and costs or otherwise, shall be held valid, and as vesting the legal title to the same in said corporation. The stock so purchased shall be held subject to the control of the remaining stock-

holders who may make such disposition of the same as they may deem fit. Whenever any portion of the capital stock of any corporation is held by the said incorporation by purchase or otherwise, a majority of the remaining shares of stock in said corporation shall be held to be a majority of the shares of stock in said incorporated company, for all purposes of election or voting on any question before a stockholders' meeting.

Sec. 40. Every corporation organized under this act may change the nature of its business, change its name, increase its capital stock, change the par value of the shares of its capital stock, decrease its capital stock, change the location of its principal office in this State, extend its corporate existence, change the number of its directors or trustees, create one or more classes of preferred stock, and make such other amendments, change or alteration as may be desired, in manner following: The Board of Directors shall pass a resolution declaring that such change or alteration is advisable and calling a meeting of the stockholders to take action thereon; the meeting shall be held upon such notice as the by-laws provide, and in the absence of such provision, upon ten days' notice, given personally or by mail; if two-thirds interest of each class of the stockholders having voting powers and of other persons having like powers shall vote in favor of such amendment, change or alteration, a certificate thereof shall be signed by the president and secretary under the corporate seal, acknowledged or proved as in the case of deeds of real estate, and such certificate, together

with the written assent, in person or by proxy, of two-thirds in interest of each class of such stockholders and creditors, if any, having voting powers, shall be filed in the office of the Secretary of State and upon the filing of the same and filing a certified copy of said certificate of amendment with the county clerk of the county where the corporation has its principal office, the certificate or articles of incorporation shall be deemed to be amended accordingly; provided, that such certificate of amendment, change or alteration shall contain only such provision as it would be lawful and proper to insert in an original certificate of incorporation made at the time of making such amendment, and the certificate of the Secretary of State that such certificate and assent have been filed in his office shall be taken and accepted as evidence of such change or alteration in all courts and places; provided, also, that no amendment making or attempting to make paid-up stock issued as paid up or the holders thereof liable to assessment or for debts of the company shall be made. [14]

Sec. 41. Any corporation of this State, whether organized under this Act or by a Special Act of Incorporation or under general laws, excepting railroad corporations, may increase or decrease its capital stock, change its name, the par value of the shares of its capital stock, or the location of its principal office in or out of this State, and fix any methods of altering its by-laws permitted by this Act in the manner prescribed in the foregoing section, and any corporation may in the same manner relin-

quish one or more branches of its business, or extend its business to such branches as might have been inserted in its original certificate of incorporation; provided, that any corporation of this State, except railroad corporations, which has exercised any of the powers, or caused to be done any of its acts, hereinabove specified, in the manner provided by this Act, shall be deemed to have possessed such powers as fully and to the same extent as if they had been expressly conferred upon such corporation by the terms and provisions of this Act, and all such powers and acts are hereby ratified, confirmed and approved. (As amended, 1909, p. 198.)

Sec. 42. The decrease of capital may be effected by retiring or reducing any class of the stock, or by drawing the necessary number of shares by lot for retirement, or by the surrender by every shareholder of his shares, and the issue to him in lieu thereof of a decreased number of shares, or by the purchase at not above par of certain shares for retirement, or by retiring shares owned by the corporation or by reducing the par value of shares; and when any corporation shall decrease the amount of its capital stock hereinbefore provided, by amendment pursuant to this and the two preceding sections, the certificate decreasing the same shall be published for three weeks successively, at least once in each week, in a newspaper published in the county in which the principal office of the corporation is located; the first publication to be made within fifteen days after the filing of such certificate, and in default thereof the directors of the corporation (shall be jointly and

severally liable for all debts of the corporation contracted before the filing of the said certificate, and the stockholders shall also be liable for such sums as they may respectively receive of the amount so reduced; provided, no such decrease of capital stock shall release the liability of any stockholder, whose shares have not been fully paid, for debts of the corporation theretofore contracted.)

(XXII)

That none of the things required by said laws to be done in the matter of reducing the capital stock of said corporation or retiring said shares so owned by this defendant, as aforesaid, were done, and said shares of stock so surrendered by said defendant to said corporation, were not purchased of said defendant by said corporation at any sale thereof for unpaid assessments, unpaid subscriptions or calls.

WHEREFORE, PLAINTIFF PRAYS that an accounting be had and taken by this Court, or by a master or referee appointed by this Court and under its supervision, to determine the amount due from [15] this defendant by reason of the matters and things herein set forth, and that plaintiff have judgment against this defendant for the sum of Thirteen Thousand Dollars, or so much thereof as may be found due, together with interest thereon from June 30th, 1908, at the rate of eight per cent per annum, and for such other and further relief as in equity he may be entitled to, and for costs, including a reasonable attorney's fee.

O. L. RIDER,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

F. G. Noyes, being first duly sworn, deposes and says: I am the plaintiff named in the foregoing complaint; I have read said complaint, know the contents thereof, and believe the same to be true.

F. G. NOYES.

Subscribed and sworn to before me this 5 day of April, A. D. 1913.

[Seal]

W. F. WHITELY,

Notary Public in and for the Territory of Alaska,
Residing at Fairbanks. [16]

Exhibit "One."

"KNOW ALL MEN BY THESE PRESENTS, that, WHEREAS, the organization of a corporation is contemplated by the undersigned under the laws of the State of Nevada, to be known as the Fairbanks Banking Company, with a capital stock of Three hundred thousand dollars, divided into three thousand shares of the par value of one hundred dollars each. The object of which said corporation is to carry on a general banking business in the town of Fairbanks, Alaska, and to absorb the present Fairbanks Banking Company, and such other banking institutions as may be deemed advisable; and WHEREAS steps are now being taken for the organization of such corporation under the laws of said State of Nevada, but owing to the distance between said State of Nevada and the town of Fairbanks, Alaska, considerable delay must necessarily

ensue before such corporation can be created and the organization thereof perfected; and WHEREAS, we, the undersigned, each and all of us are desirous of becoming stockholders in said corporation for the number of shares hereinafter by us set opposite our respective names, and are desirous that in order that the capital stock of said corporation shall be fully subscribed, and the names and number of stockholders of said new corporation may be known to us, that subscriptions for such stock should now be made.

NOW, THEREFORE, in consideration of the premises, we, the undersigned, do hereby promise and agree to and with each other and with said new corporation to be formed to be known as the Fairbanks Banking Company, to subscribe, and each of us do hereby subscribe of the capital stock of said Fairbanks Banking Company, the number of shares by us set opposite our respective names and that when said corporation is organized and the stock thereof issued to us we will either pay to the Treasurer of said corporation the par value thereof, or such an amount thereof as we can conveniently pay; or, in the event at said time we are unable to make any cash payment upon said stock, that each will give his promissory note for the individual amount of stock subscribed by him; one due on or before the first day of June, 1908, for twenty-five per cent of the amount of the capital stock subscribed by him, and the other for seventy-five per cent thereof, which shall become due and payable on or before the first day of July, 1908; said notes to bear interest

at the rate of one per cent per month from the date of the issuance of the stock. If at the time the stock shall be issued any of the undersigned shall pay thereof an amount equal to twenty-five per cent thereof, then such person is to execute his note for the remaining seventy-five per cent due on or before the first day of July, 1908. If said payment so made shall not equal twenty-five per cent of the par value thereof then such individual agrees to execute a note for the amount equal to twenty-five per cent thereof, which shall become due and payable on or before the first day of June, 1908, and a note for the remaining seventy-five per cent as hereinafter set forth. It is expressly understood and agreed that said corporation is to retain and remain the owners of stock until the same is fully paid.

IN WITNESS WHEREOF we have hereunto set our hands and seals this —— day of January, 1908." [17]

AGREEMENT.

This Indenture, made and entered into this 16th day of March, 1908, by and between E. T. Barnette, James W. Hill and R. C. Wood, copartners doing business under the firm name and style of the Fairbanks Banking Company of Fairbanks, Alaska, the parties of the first part, and the Fairbanks Banking Company, a corporation organized, created and existing under and by virtue of the laws of the State of Nevada, party of the second part,

WITNESSETH: That, whereas, the parties of the first part as copartners since the month of May, 1905, have been engaged in carrying on and con-

ducting a general banking business in the town of Fairbanks, Alaska, under the name and style of the Fairbanks Banking Company, and is possessed at this time as a part of the property and business of said copartnership—

(a) Stock in the following corporations, namely:

1. Four-fifths of the entire stock of the Gold Bar Lumber Company, a corporation organized, created and existing under and by virtue of the laws of the State of Washington. The certificates of which were issued August the 14th, 1906, as follows: Certificate No. 11 to R. C. Wood, 24 shares; Certificate No. 12 E. T. Barnette, 48 shares; Certificate No. 13 James W. Hill, 24 shares. Said Certificates of Stock now being in the possession of the Scandinavian-American Bank of Seattle, Washington, and enjoined by Seattle Court from delivering. Said stock being of the value of \$341,949.00 as per statement hereto attached marked Exhibit "A."

2. The entire stock of the Tanana Publishing Company, a corporation organized and existing under and by virtue [18] of the laws of the state of Washington. Said stock being of the agreed value of \$12,000.00.

(b) of the following real estate:—

1. Bank building and lot of the agreed
value of\$19,423.58
2. Warehouse of agreed value of 3,360.00
3. Building and lot town of Cleary where
a branch bank is being conducted;
the agreed value of..... 1,695.50

4. Assay building and plant, agreed
value of 2,860.57

(c) Have outstanding loans and dis-
counts of the value of 353,842.54

All of which are evidenced by notes of the parties
owing the same. A scheduled statement specifying
the name of the debtor, and the face of the note is
hereto attached and marked Exhibit "B." Some of
which said notes are secured by mortgages upon real
or personal property; and

(d) Overdrafts as appear upon the
books of the parties of the first part, of
the agreed value of 8,326.75
as per list attached marked Exhibit "C."

(e) Due from Banks as fol-
lows:—

Bank of B. N. A.	2236.66	
Dome City Bank.....	714.42	
National Park Bank	790.61	
Seattle National Bank	3951.00	
Valdez Bank & Mercantile Co..	247.78	
Dexter Horton & Co.....	1240.40	
Amounting to the sum of.....		9,180.87

(f) Cash on hand amount-
ing to 35,774.38

(g) Gold-dust of the value
of 2,737.49

(h) Sundry other credits of
the parties of the first part to
the agreed value of 637.34

Making the total resources of

the Bank as agreed upon by the parties hereto of the value of.. 790,940.31
and,

Whereas, the liabilities of said parties of the first part are as follows:

- | | |
|-----------------------------------|------------|
| 1. Script now in circulation..... | 64,737.00 |
| 2. Deposits—Ordinary | 356,677.92 |
| 3. Deposits—Savings | 63,238.22 |

[19]

4. Due to Banks as follows:—

Alaska Bank & Safe Deposit Co....	273.44
Ladd & Tilton	355.96
Corn Exchange National Bank....	7,659.38
First National Bank, San Francisco	7357.09
Scandinavian American Bank....	12713.93
National Bank of Commerce.....	12.81
Cleary Branch	25919.56

Making a total liability 538940.31

And,

Whereas, the party of the second part was incorporated for the express purpose of taking over all of the property, real, personal and mixed of the parties of the first part, their business and good will (save and except the sum of \$200,000.00, the original capital of the parties of the first part, the same being the personal property of E. T. Barnette) to the valuation thereon placed, as heretofore set forth. And in consideration thereof was to assume and pay all the liabilities of the parties of the first part, as hereinbefore set forth; and

Whereas, E. T. Barnette of the parties of the first

part has personally belonging to him of the assets of the parties of the first part the sum of \$200,000.00, being the amount of the capital stock of the parties of the first part contributed to said co-partnership by the said E. T. Barnette; and it has been agreed that said sum of \$200,000.00 shall be repaid by the party of the second part to the said E. T. Barnette one year from the release of the said Gold Bar Stock from the injunction now in force against it; and that said E. T. Barnette during said time shall leave said amount upon deposit without interest with the party of the second part, provided, however, that in the event the party of the second part shall sell said Gold Bar Stock for cash, then the said sum of \$200,000.00 immediately upon receipt of said cash by the party of the second part shall become immediately [20] due and payable; and in the event that said Gold Bar Stock is not sold for cash, but part for cash and part on time, then the said E. T. Barnette shall be entitled to receive such a proportion of said sum of \$200,000.00 as the cash paid upon the purchase price of said Gold Bar Stock shall bear to the entire purchase price, and,

Whereas, owing to a certain action now pending in the Superior Court of the State of Washington, for King County, entitled J. H. Causten, Plaintiff, vs. E. T. Barnette, Defendant, in which said action the said Causten is seeking to be declared the owner of a certain part and portion of the capital stock of the Gold Bar Lumber Company issued in the name of E. T. Barnette, as heretofore set forth; and

Whereas, said litigation is now undetermined, and

the right of the said Causten to any part or portion of said stock of the Gold Bar Lumber Company is undetermined, and it is the desire of the said E. T. Barnette, and the party of the second part, that the said E. T. Barnette shall indemnify the party of the second part for any loss that may be sustained by reason of any adverse decision in the value of the Gold Bar Stock; and said E. T. Barnette has heretofore agreed that the sum of \$200,000.00 before mentioned shall also be security to the party of the second part under the conditions and terms set forth on page three of this agreement, against any adverse decision of the court in Causten vs. Barnette suit, as such decision may decrease the value of the Gold Bar property as accepted by the party of the second part; and

Whereas, the party of the second part has agreed with the parties of the first part to issue to them stock for the amount that the assets of said company shall exceed its liabilities less the sum of \$200,000.00, and the parties of the first part have agreed to accept the same, [21]

Now, therefore, for the purpose of carrying out the terms and agreements between the parties hereto, as hereinbefore set forth, this Indenture,

Witnesseth: That the parties of the first part for and in consideration of the foregoing and of other good and valuable consideration to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, do by these presents assign, transfer and set over unto the party of the second part, four-fifths of the entire stock of the Gold Bar

Lumber Company, a corporation created and existing under and by virtue of the laws of the State of Washington, and agree to transfer and deliver to the party of the second part the Certificates of stock now owned by them as hereinbefore set forth as soon as they obtain possession of same; and do hereby assign, transfer and set over unto the party of the second part all of their right, title and interest in and to all and singular the property, real, personal and mixed of said Gold Bar Lumber Company situated at Gold Bar, Washington, or wheresoever situated according to statements hereto attached.

And the said E. T. Barnette personally agrees to and with the party of the second part that he will save the party of the second part harmless as to any decrease in the value of said Gold Bar Lumber Company Stock on account of the litigation now pending in the Court of Seattle entitled Causten vs. Barnette, and that the sum of \$200,000.00 shall remain upon deposit with the Fairbanks Banking Company upon the terms and conditions heretofore set forth on page 3 of this agreement, and the security to said party of the second part against any adverse decision of the court in said suit which may decrease the value of the Gold Bar property as accepted by the party of the second part.

The parties of the first part also hereby assign, transfer [22] and set over unto the party of the second part all of their stock in and to the Tanana Publishing Company, and the property that belongs to said corporation as heretofore agreed between the parties. It being understood that the stock of paper

now in the possession of the parties of the first part shall remain and be their property.

The parties of the first part hereby assign, transfer and set unto the party of the second part all their right, title and interest in and to the Bank Building and the lot upon which the same is situated, the warehouse situated thereon, the building and lot in the town of Cleary, and all the right, title and interest in and to the assay building and plant situated in Fairbanks, Alaska, and hereby agree that they will procure and execute the necessary deeds to transfer said real property. And the parties of the first part hereby agree that they will procure and execute the necessary deeds to transfer said real property. And the parties of the first part hereby assign, transfer and set over unto the party of the second part all and singular the personal property, fixtures, vault, safe deposit boxes, and stock in trade, apparatus and effects used in connection with the business of said bank, and the business and good will of the parties of the first part to the party of the second part, and to its assigns forever.

The parties of the first part hereby assign, transfer and set over unto the party of the second part all of their outstanding loans and discounts as the same appear in the scheduled statement hereto attached marked Exhibit "A," and the notes of the debtors given to evidence the amount of such loans and discounts, together with all mortgages upon real or personal property that have been given to secure the same, and hereby agree that they will transfer to the party of the second part by proper indorsement all

of said notes and mortgages and forthwith deliver the same into the [23] possession of the party of the second part.

Also all of the right, title and interest of the parties of the first part in and to all overdrafts as the same appear upon the list hereto attached marked Exhibit C, and all moneys due and owing the parties of the first part from the Banks mentioned in page 2 of this agreement; and likewise hereby transfer, assign and set over to the party of the second part all cash on hand now belonging to the parties of the first part; all gold-dust in their possession as the same appears on page 2 of this agreement, and all the property of the parties of the first part, real, personal or mixed that has this day been turned over to the party of the second part, and of which the party of the second part is now in the possession of.

The intention of this agreement being to place the party of the second part in the shoes of the parties of the first part as to the Banking Business of the Fairbanks Banking Company and as to all properties heretofore mentioned or specified.

To have and to hold unto the party of the second part, its successors and assigns, forever.

And the parties of the first part hereby authorize and empower the party of the second part, its successors and assigns, to perform all acts that may be necessary to protect and preserve the properties hereby assigned; and to bring all necessary actions at the cost of the party of the second part to enforce the collection thereof, or to protect the same.

And the said party of the second part in considera-

tion of the foregoing hereby covenant and agree to and with the parties of the first part that it will in due course pay all the debts and discharge all the liabilities of the said parties of the first part as the same are specified on [24] pages 2 and 3 of this agreement, and will at all times hereafter effectually keep indemnified the parties of the first part their executors and administrators and their assets and effects against all such debts and liabilities and all actions, proceedings, costs and expenses in respect thereto, and all costs and expenses by reason of any action or proceeding which may be instituted or taken by said party of the second part by virtue of the power or authority hereinbefore contained, or of anything relating thereto.

The party of the second part agrees to pay to E. T. Barnette the sum of \$200,000.00 as hereinbefore on page three of this agreement specified, save and except, however, that if a decision adverse to the said E. T. Barnette shall be rendered in said cause of Causten vs. Barnette and by reason thereof the value of the Gold Bar Stock shall be depreciated by reason of Causten being declared the owner of a part or portion thereof, then, the amount of such depreciation shall be deducted from said sum of Two Hundred Thousand Dollars.

The party of the second part hereby agrees that it will issue to the parties of the first part paid up stock to the amount they shall be entitled to under the terms of this agreement.

This agreement shall extend to and bind the heirs,

executors, administrators, successors and assigns of the parties hereto.

In witness whereof the parties of the first part have hereunto set their hands and seals, and the party of the second part by resolution of its Board of Directors has hereunto by its President and Secretary set its corporate name and seal this the 16th day of March, 1908.

JOHN L. MCGINN.

H. F. YEAGER.

E. T. BARNETTE. (Seal)

JAMES W. HILL. (Seal)

R. C. WOOD. (Seal)

FAIRBANKS BANKING COMPANY.

Signed, sealed and delivered in the presence of:

[25]

By E. T. BARNETTE.

President.

[Seal] Attest: B. R. DUSENBURY. Secretary.

United States of America,

Territory of Alaska.—ss.

This is to certify that on this the 16th day of March, 1908, personally appeared, E. T. Barnette, James W. Hill and R. C. Wood to me personally known to be the individuals described in and whose signatures are subscribed to the foregoing instrument and they acknowledged to me individually and not one for the other that they signed, sealed and delivered the said instrument freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and seal this the day and year hereinabove written.

[Seal]

JOHN L. McGINN,

Notary Public for Alaska. [26]

United States of America,

Territory of Alaska,—ss.

This is to certify that on this the 16th day of March, 1908, personally appeared, before me E. T. Barnette and B. R. Dusenbury to me personally known and known to me to be the president and secretary, respectively of the Fairbanks Banking Company, the corporation named in the foregoing instrument as the party of the second part, and the said president executed the said instrument, and acknowledged to me that he signed, sealed and delivered the same by authority of the Board of Directors of said corporation, for the uses and purposes therein mentioned, and the secretary affixed the seal of said corporation thereto.

In witness whereof, I have hereunto set my hand and seal this day and year hereinabove written.

[Seal]

JOHN L. McGINN,

Notary Public for Alaska. [27]

EXHIBIT "B"

LOANS AND DISCOUNTS.

2020	Altman, Max.....	2500.00
1236	Anderson Brothers.....	1165.00
1657	Asheim, Sam	618.58
2095	Armstrong, et al	11468.90
2093	“ “	13785.80
2094	“ “	3931.01

1849	Atchison, John	650.00
1975	Barrett, William	16855.85
1225	“ “	16476.18
1435	Brazeau, Ben	400.00
1958	Balthuff & Sickinger.....	300.00
1334	Badger, H. M.	194.00
1931	Boker, J. E.	150.00
1523	Burke & Deal.....	100.00
1255	Barthel Brewing Co.	14000.00
1642	“ “ “	3200.00
1587	Berger D. H.....	550.00
1110	Balzimer & McRae	800.00
1991	Bechtol, John J.	132.82
1795	Burnes, J. E. & Baird, J. F.....	47.00
1333	Badger, H. M.	735.00
2036	Courtemanche, Dave	500.00
1239	Cribb, Harry	1200.00
1240	“ “	4000.00
2102	Cook & Co.	13326.62
2110	City Warrant	40.00
2111	“ “	52.70
1613	Claypool, C. E.	1744.90
1943	Cleary, Frank	500.00
1696	Charles, P. G.	103.08
2053	Collins, John	300.00
2054	Craig, W. A.	2200.00
2049	Campbell, E. C.	200.00
1403	Clark, et al.....	800.00
1495	“ “	250.00
1528	“ “	1000.00
2088	Cook, H.	14392.90
2087	“ “	3074.49

2086	“ “	916.49
1786	Claypool, C. E.	150.00
1888	Clum, John P.	250.00
1699	Colbert, L. D.	96.87
280	Casey & Saylor.....	40.00
1521	Charles & Bernard	200.00
1163	Cathcart, Edgar	410.00
2085	Cook, H.	1965.50
645	Cloes, H. G.	158.50
2118	City Warrant	387.50
2117	“ “	35.00
1393	Doring, H.	609.52
1254	Draper, Charles	75.00
1259	Evans & Porter	171.35
1858	Fairburn, L. A.	125.00
[28]		
1688	Fairburn et al	1700.00
1861	Fairburn “	300.00
1544	Frost, Jas.	750.00
1733	Frost, Jas.	100.00
1891	Fairbanks Commission House.....	33.95
1937	Floradora	338.37
1530	Fairbanks Commission House.....	2000.00
1469	“ “ “	212.50
1306	Gilcher, William	495.10
1994	Grant, H. G.	7.70
1591	Gelling & Bechtolt.....	1050.00
1753	Gaustad O. P. et al.....	175.00
2059	Green, V. O.	50.00
1952	“ “	504.25
1939	“ “	250.00
1926	“ “	2332.34

2048	“ “	50.00
1855	Gardiner, H. E.	2824.00
892	Gregg, Geo.	59.30
1721	Green, W. F.	1332.74
1854	Gallagher, Phil	150.00
1329	Guenther, O. J.	202.00
1808	Hutchinson, Geo.	300.00
1836	Hall, Frank	4000.00
1745	Hannum & Hamilton	1500.00
1155	Hudson, F. P.	125.00
1853	Hall, F. H.	75.00
1601	Howe, E. D.	157.25
1274	“ “	150.00
1174	“ “	150.00
2005	Hilliard, J. J., Jonas, D. H.	2000.00
2017	Heilig & Tozier	538.71
2055	Houlihan, J. C.	89.00
2006	Ingels, F. B.	2000.00
1900	Johnson, A. J.	200.00
1497	Johnson, Chas, et al	1000.00
1604	James, B. T.	2000.00
2069	Jonas & Brown.....	2000.00
1921	Johnstone, J. I.	450.00
1548	James, William	4301.00
2119	Jonas & Brown.....	300.00
2114	Johnson, John C.	450.00
1635	Keevey, et al	730.00
2022	Kellogg, Geo.	625.00
1489	Karstens, H. P.	100.00
1510	“ “	100.00
1990	Lewis, L. T.	160.00
1632	Larsen, Alex.	797.71

552	Long, et al	50.00
1616	Lindsey, et al	200.00
1382	Longdon, W. C. et al	200.00
1911	Lund, et al.....	100.00
648	Long, et al.....	505.00
1846	Maltby, Alfred	88.75
1430	McPhee & Sheppard	7000.00
2113	McRae, D. D.	50.00
2104	MacCormack, J. W. Agt.	208.40
1683	Meehan & Kelly	450.00
2041	Moran, B. H.	500.00
2073	McIlroy, S. D.	250.00
[29]		
1653	McDowell, J. E.....	200.00
2032	McInroy, Chas. A.	344.18
2089	McGinn & Sullivan.....	3931.01
2090	“ “	28180.28
2057	McMullen, M. H.	2000.00
1701	MacCormack, J. W.	300.00
1844	“ “	45.00
1879	Markinson, et al.....	373.50
675	Morency, Al.	800.00
1907	McNeil, M.	500.00
1421	McCauley, C. D.	350.00
2016	McGowan, Thos.	1000.00
1585	McNeer, A. H.	1525.00
1988	MacArthur, Mrs. A. J.	2400.00
2076	Moe & Schroeder.....	230.00
2099	News Publishing Co.	262.50
1837	Nelson & Peterson.....	10000.00
2027	News Publishing Co.	509.75
2116	“ “ “	442.79

1946	Overgaard, et al.....	275.00
1540	Propes, W. H. et al.....	261.50
1731	Petree, Dave	5500.00
1957	“ “	2800.00
1356	Pres. Church	1050.00
774	Porter, W. H.	2070.33
2003	Rose & Kellum	750.00
2115	Royal Hotel	120.00
1593	Rutherford & Widman.....	2500.00
1878	Rusk, E. M.	250.00
1995	Roth, et al.....	1500.00
2101	Roy, H. T.	75.00
2091	Ridenour, J. C.	11236.90
2092	“ “	1933.53
2097	Royal Hotel	180.00
656	Roberts, et al.....	50.00
2067	Red Cross Drug Store.....	3350.00
1376	Schaupp, Fred	4420.00
1606	“ “	438.00
2103	“ “	1245.81
1912	Slippern, J. A.	925.00
1525	Spencer, et al.....	1891.44
1260	Sullivan, M. L.	4500.00
2016	Smith, John C.	1000.00
1887	Sullivan, Jno. E. et al.....	250.00
506	Sorensen Bros.	450.00
1996	Str. White Seal	43.69
1940	St. George, H. E.	400.00
1984	Smith, Jos. H.	2000.00
1947	“ “	3000.00
2064	Shephard, Robt.	5056.57
1692	Scott & Spencer	2000.00

1067	Sullivan, M. J.	300.00
1311	Stein, Abe	700.00
1304	Sorensen, Rufus	2824.00
2074	Shinkle, W. A.	1000.00
1899	Tanana Electric Co.	2600.00
2080	“ “ “	25397.38
1380	Thompson, et al.	250.00
1583	Truitt, D. N.	1000.00
358	Timmerman, C.	105.00
1442	Thompson, W. F.	358.80
1686	Tharp, Rusk & Smith.	2313.45
[30]		
2007	Tharp, Rusk & Smith.	2500.00
2018	“ “ “	1000.00
2008	Tharp & Rusk	2000.00
1787	Vedin, Gus.	1587.00
2035	Witte Pascal, et al.	545.00
2106	Webb, W. A.	200.00
2079	Williams, A. J.	600.00
1063	Wickersham, Edgar	560.00
1993	Waters, Emile	40.00
1054	Morgan, J. et al.	200.00
1820	Wilson, E. M. et al.	100.00
1821	“ “ “	100.00
1779	Wile, L. & Boas, A.	400.00
1922	Warren, Minnie	86.50
1778	“ “ “	180.00
1629	Williams, E. & Dora.	3000.00
2012	Young S. Hall	575.00
1391	Zimmerman, J. F. et al.	900.00
2056	Zuber, Anthony, et al.	650.00

1835	York, J. T.	100.00
216	“ “	100.00
260	“ “	500.00

Total.....\$353842.54

CLEARY BRANCH.

James Coyle & J. A. Grant.....	300.00
Al. Hilty	200.00
E. M. Bockfinger & P. A. Wilson.....	300.00
Gunner Nelson & C. Ericson	100.00
M. J. McDermott	200.00
John Hamilton, A. J. Nordale, John Flygar.	2820.00

Total.....\$3920.00

[31]

EXHIBIT "A."

STATEMENT OF THE GOLD BAR LUMBER CO., OCTOBER 1, 1907. RESOURCES.

Camp Equipment	31910.23
Horses and Wagons	501.06
Insurance	1686.60
Lumber	37679.68
Lighting Equipment	2808.45
Mill Site	5000.00
Mill Buildings	23403.58
Mill Equipment	68665.34
Northern Bank & Trust Co.	2080.22
Office Fur. & Fixt.	545.13
Real Estate	18400.00
Timber Lands	204956.05
Valley Supply Co. Stock	9574.16
Water System	10313.82
Accounts Receivable	18806.96

Total Resources

436331.28

LIABILITIES

Bills Payable	68112.82
Wages due	6062.47
Accounts payable	3036.81

Total Liabilities	77212.10
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NET RESOURCES 359119.18

GAINS.

Cook Camp	970.28
Lumber Sales	186738.10
Light Rents	79.25
Real Estate	47.32
Rents	2684.56
Valley Supply Co. Stock	4574.16
Water Rents	165.42

Total Gains	195259.09
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LOSSES.

Depreciation Camp Equip.	3545.58
“ Horses and Wagons	55.67
“ Light Equipment	312.05
“ Mill Buildings	2600.39
“ Mill Equipment	7629.48
“ Furniture & Fixtures	60.57
Cruising Account	302.85
Camp Expense	4804.37
General Expense	9489.62
Interest & Discount	5807.22
Insurance	4382.36
Labor	125008.96
Mill Expense	6248.03
Profit & Loss	4554.93
Real Estate Repairs	391.28
Taxes	2619.40

Total Losses	177812.76
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NET GAIN

17446.33

CAPITAL Stock Oct. 1, 1906	12000.00
Surplus “ “	329672.85

Net Resources Oct. 1, 1906.....	341672.85
Net Resources Oct. 1, 1907.....	359119.18
Add increase in value of Timber Lands-1/3	68318.68
	<hr/>
	427,437.86
4/5 interest value	341,949.00

[33]

STATEMENT OF THE CONDITION OF THE VALLEY SUPPLY CO.,
Oct. 1, 1907.

RESOURCES.

Cash	211.30	
Merchandise	11953.90	
Furniture and Fixtures	926.48	
Accounts Receivable	2652.42	
	<hr/>	
Total Resources		15744.10

LIABILITIES.

Accounts payable	6169.94	
Total Liabilities		6169.94
		<hr/>
Net Resources Oct. 1, '07		\$9574.16

PROFITS.

Merchandise	5833.46	
P. O. Receipts	266.87	
Interest & Discount	1563.38	
	<hr/>	
Total profits		7663.71

LOSSES.

Expense	220.91	
Rent	800.00	
Labor	3034.02	
Depreciation Fur. & Fixt.	102.94	
	<hr/>	
Total losses		4157.87

Net Gain	3505.84	
Capital invested June 1, '06		6068.32
		<hr/>
		9574.16

Net Resources Oct. 1, '07

[34]

EXHIBIT "C."

FAIRBANKS BANKING COMPANY.

LIST OF OVERDRAFTS AS MARCH 16, 1908.

Asheim, S.....	\$ 37.11
Adcock, Mrs.....	240.06
Barnette, E. T.....	130.17
Barnette & Yarnell.....	1162.05
Boarman, F. B.....	2069.50
Chapman, G. H.....	5.00
Collins, John.....	7.45
Emberley, Isabelle.....	8.93
Fox, James.....	1.00
Higgins, Geo. G.....	50.00
Kearney, C. J.....	735.50
Kennedy, D. A.....	1.23
Kennedy, D. T.....	174.00
Matheson & Holmquist.....	1.25
Merrill, G. H.....	3.00
Morrison, Ronald.....	578.27
Monarch Association.....	289.20
MacCormack, Edith.....	14.05
McMullen, Ed.....	11.00
News Publishing Co.....	16.33
Steamer White Seal.....	9.75
Smith, A. T.....	52.26
Sigler, Chas. T.....	31.06
Scholling, G. L.....	2621.58
Scott & Spencer.....	14.04
Sullivan, M. L., Witness.....	18.25
Wisconsin Group Assn.....	43.75
Worman, C. N.....	1.00

[Indorsed]: No. 1894. In the District Court for the Territory of Alaska, Fourth Division. F. G. Noyes, Receiver of the Washington-Alaska Bank, a Corporation, Plaintiff, vs. R. C. Wood, Defendant. Complaint. Filed in the District Court, Territory of Alaska, 4th Div. Apr. 5, 1913. C. C. Page, Clerk. By H. C. Green, Deputy. [36]

[Title of Court and Cause.]

Answer.

Comes now the defendant and answering the complaint of the plaintiff on file herein, admits, denies and alleges as follows:

I.

Denies paragraph 3 of said complaint.

II.

Answering paragraph 4, defendant denies that he subscribed for 220, or any, shares of the capital stock of said corporation.

III.

Defendant denies paragraph 8 of said complaint, except as in the first further and separate answer hereinafter admitted.

IV.

Denies paragraph 9 of said complaint.

V.

Denies paragraph 10 of said complaint.

VI.

Answering paragraph 11 of said complaint, the defendant denies each and every allegation therein contained, except that said R. C. Wood entered upon the discharge of his duties as cashier of said corpora-

tion early in April, 1908, and continued as such to June 29, 1908.

VII.

Denies each and every allegation, matter and thing contained in paragraph 12 of said complaint.

VIII.

Denies each and every allegation, matter and thing contained [37] in paragraph 13 of said complaint.

IX.

Denies each and every allegation, matter and thing contained in paragraph 14 of said complaint.

X.

In answer to paragraph 15 of said complaint, this defendant says that as to whether or not on the 4th day of January, 1911, said Washington-Alaska Bank had liabilities in excess of \$1,037,296.13, consisting of amounts due depositors, other than banks, of \$921,357.56, and amounts due banks in excess of \$115,938.57, and that the assets of said Washington-Alaska Bank were then and still are insufficient to pay said liabilities in full, and said liabilities are now, or were in excess of \$556,735.98, this defendant has no knowledge or information sufficient to form a belief, and therefore denies the same.

As to the other matters and things alleged in said paragraph 15, this defendant denies each and every allegation thereof.

XI.

Answering paragraph 16 of said complaint, this defendant denies that said F. G. Noyes thereupon or at all, duly qualified or entered upon his duties as receiver, or ever since has been or now is the duly

qualified and acting receiver of said Washington-Alaska Bank, or as such is plaintiff in this suit.

XII.

As to the matters and things contained in paragraph 17 of said complaint, this defendant *denies* *has* any knowledge or information sufficient to form a belief, save and except that dividends aggregating fifty per cent of the proven liabilities of said bank have been paid.

XIII.

As to the matters and things contained in paragraph 18 of said complaint, this defendant has no knowledge or information [38] sufficient to form a belief, and therefore denies the same.

XIV.

Answering paragraph 19 of said complaint, this defendant denies that he has any knowledge or information sufficient to form a belief as to the matters and things therein contained, save and except that the Fairbanks Banking Company, afterward known as the Washington-Alaska Bank, had invested the sum of \$341,949 of its assets in the stock of the Gold Bar Lumber Company, and that the same constituted an asset for that amount at the time said Washington-Alaska Bank ceased business; and denies that if said stock of said Gold Bar Lumber Company has any value in excess of \$132,000.00 it is of a highly speculative and uncertain character.

XV.

As to the matters and things contained in paragraph 20 of said complaint, this defendant has no knowledge or information sufficient to form a belief,

and therefore denies the same; save and except that he denies positively that of the whole amount of the bills, notes and overdrafts of said bank that are past due only about \$25,000 worth are due and owing from solvent debtors or can be collected, and that the remainder thereof are bad, worthless, and uncollectible.

XVI.

As to the matters and things contained in paragraph 21 and paragraph 22 of said complaint, this defendant has no knowledge or information sufficient to form a belief, and therefore denies the same.

This defendant, for a first, further and separate answer and defense, alleges:

I.

That in the fore part of January, 1908, a large number of business, professional and mining men of the Fairbanks Recording [39] District, Alaska, met in the town of Fairbanks, Alaska, for the purpose of organizing a corporation to purchase, take over and absorb the business of the Fairbanks Banking Company, a copartnership, and at said meeting negotiations were begun by said proposed incorporators with said partnership for the purchase of the same. That at said meeting a committee was appointed to go into the details of the reorganization of the Fairbanks Banking Company, and to report a basis upon which the business should be taken over.

II.

That said committee met on the 5th day of January, 1908, and after investigating the affairs of the bank, made the following report to be presented for

the consideration of the proposed new corporation:

(a) That the issued stock for the proposed new corporation be as of date February 15, 1908; that notes be taken for all deferred payments; that the same bear interest at the rate of one per cent per month from February 15, 1908, until paid; that twenty-five per centum of the unpaid for stock be due and payable on or before June 1st, 1908, and that the balance be due and payable on or before July 1st, 1908.

(b) That captain E. T. Barnette and James W. Hill, with such associates as they may require, prepare a subscription list.

(c) That the amounts subscribed by any person be left to that person, and in case of over-subscription should be reduced proportionately.

(d) That the notes, properties, and securities of the Fairbanks Banking Company, the old institution, examined by its present acting board of trustees and on which a valuation of \$288,000.00 in excess of its liabilities was placed, be accepted.

(e) That all notes, properties and securities which said board of trustees placed in the No. 3 or doubtful class remain the property of the old institution. [40]

(f) That all interest on existing loans as of December 19, 1907, be computed to February 15, 1908, and that the amount of such accrued interest be placed to the credit of the old institution on the books of the new corporation, and that the same be payable on or before December 31, 1908.

(g) That should James W. Hill and R. C. Wood

not take the full forty-four thousand dollars in stock in the new corporation, the balance of the amount not so taken to be paid to them not later than July 1st, 1908.

(h) That the proposition of captain E. T. Barnette to leave on deposit with the new corporation the sum of two hundred thousand dollars, without interest for one year be accepted, and that it be the understanding that such deposit will secure said new corporation against any adverse decision of the Court in the Caustens vs. Barnette suit, in so far as such decision may decrease the value of the Gold Bar Company property as accepted by the present board of trustees.

(i) That the officers of the new corporation be a president, vice-president, second vice-president, cashier, assistant cashier, treasurer and secretary.

(j) That the number of the board of directors be twelve, four to be elected for six months, four for twelve months, and four for eighteen months or until their respective successors are duly elected and qualified.

(k) That dividends be declared semi-annually on June 30 and December 31.

III.

That said report was, on January 6th, 1908, submitted to said proposed incorporators, and at said meeting the said report was read and passed on section by section, and on motion duly made and carried was adopted and ordered kept as a part of the records of said meeting. [41]

IV.

That at said meeting it was also agreed on behalf

of the Fairbanks Banking Company, a copartnership, that said copartnership would turn over to said corporation the property of said Fairbanks Banking Company, a copartnership, on the terms specified in said report, and said proposed incorporators in behalf of said proposed corporation, in consideration thereof, agreed to assume the liabilities of said copartnership.

V.

That the articles of incorporation of said Fairbanks Banking Company did not arrive in Fairbanks until sometime in the month of March, 1908, and immediately thereafter a meeting of the stockholders of the Fairbanks Banking Company, a corporation, was called, and at said meeting said stockholders, among other things, adopted by-laws and elected a board of directors, and also passed a resolution to the effect that the matter of taking over the property of the Fairbanks Banking Company, a partnership, be left to the Board of Directors.

VI.

That immediately after the adjournment of said stockholders' meeting, the Board of Directors met and organized by the election of a president, vice-president, cashier, assistant cashier, secretary and treasurer, and at said meeting it was moved and duly seconded and carried "that the directors ratify the arrangement as to the taking over of the assets, property and business, and liabilities, of E. T. Barnette, James W. Hill and R. C. Wood, upon the terms and conditions set forth in the minutes of the meeting of the subscribers held January 5, 1908," which said

terms and conditions are set forth in paragraph 2 hereof.

VII.

That at said meeting of the directors, a resolution was passed that the executive committee theretofore appointed at the meeting of the Board of Directors be empowered to see that all [42] papers and transfers be made properly by the officers of the old Fairbanks Banking Company, a partnership, and that such transactions be legally carried out.

VIII.

That thereupon said executive committee met and went over the resources and liabilities of said Fairbanks Banking Company, a partnership, and instructed the attorneys of said corporation to prepare the necessary transfers conveying the property of said Fairbanks Banking Company, a partnership, to the corporation upon the terms and conditions set forth in the minutes of the meeting of January 5, 1908, save and except that certain notes which were then in existence were not to be turned over to the new corporation which thereby reduced the amount of shares of stock to be issued to said partners.

IX.

That during all the negotiations heretofore mentioned the defendant, R. C. Wood was not in Alaska, and was either in the State of California or the State of Washington. That said Wood's name was signed to the original subscription list, without his knowledge, by E. T. Barnette, and with the understanding of all the subscribers that it was optional with the said R. C. Wood on his return to Fairbanks, Alaska,

to elect either to take stock in the new corporation, or to receive money for the amount of stock to which he was entitled in lieu thereof.

X.

That in accordance with the directions of the Board of Directors made upon the 12th day of March, 1908, to the executive committee, the executive committee proceeded to have the necessary papers and transfers made out conveying the property of the partnership to the corporation on the terms stated in the resolutions of January 5, 1908, and requested that the then attorneys of the bank prepare the necessary papers for that purpose.

That in compliance with said request, the said attorneys [43] undertook to draw up an agreement stating the true terms and conditions of said sale and transfer, which is the agreement attached to plaintiff's amended complaint and marked Exhibit "1."

That said agreement, through the mutual mistake of the parties, the partners and the corporation, and without the fault of either, failed to set forth truly all the terms and conditions of the agreement between said Fairbanks Banking Company, a copartnership, and the corporation, in this: That said agreement failed to reserve to said copartners the accrued interest on all loans in existence on the 12th day of December, 1907, up to the 15th day of March, 1908, and, second, in that it failed to embody the option given to said James W. Hill and R. C. Wood either to take stock for their portion of the surplus property of the partnership, or to take money, and that

in the event of their desire to take money that the amounts should be paid to them not later than July 1st, 1908.

XI.

That, with said exceptions, said agreement attached to plaintiff's amended complaint and marked Exhibit "1," fully sets forth the terms and conditions agreed upon and entered into between the Fairbanks Banking Company, a copartnership, and the corporation.

XII.

That the value placed upon said assets of the partnership was the value placed thereon by the stockholders, and that the resolution of the stockholders of March 12, 1908, authorizing the directors to take over such assets contemplated only the execution of the formal papers necessary for the purpose of the transfer, and not that the directors should exercise their individual judgment in determining the value of such assets. [44]

XIII.

That in accordance with the true agreement had between the copartnership and the corporation, The Fairbanks Banking Company, a corporation, issued to E. T. Barnette 260 shares of the capital stock of said corporation, and to James W. Hill 130 shares thereof, but no stock was ever issued or delivered to said R. C. Wood.

That said R. C. Wood returned to Fairbanks, Alaska, on or about the 14th day of April, 1908, and at once notified the said corporation of his election to take money in lieu of stock, and at said time, and

after reading said agreement of March 16, 1908, being Exhibit "1" attached to plaintiff's complaint, refused to sign the same for the reason that in said agreement it set forth that he had subscribed for stock. That at said time it was agreed between the said R. C. Wood and the said corporation that he should have the right to take cash instead of stock up to July 1, 1908, and at said time there was shown to said Wood by said corporation the report of the committee of January 5, 1908, and the minutes of the corporation of March 12, 1908.

XIV.

That said Wood signed the said agreement of March 16, 1908, marked Exhibit "2" attached to plaintiff's complaint, with the distinct understanding on his part and of the Fairbanks Banking Company, a corporation, that said report and minutes reserved to him the right to take money in lieu of stock; and it was never contemplated or understood by the said R. C. Wood or by the said corporation that by signing said agreement he would waive any right to take money in lieu of his stock.

XV.

That said Wood on or about the 17th day of April, 1908, entered upon his duties as cashier of said corporation, and continued as such cashier up until the 29th day of June, 1908. [45]

XVI.

That the Board of Directors and officers of said bank, in paying the money to said R. C. Wood, merely carried out the terms of the agreement entered into between said Wood and said corporation.

And defendant, for a second further and separate answer and defence to plaintiff's complaint, alleges:

I.

That the Fairbanks Banking Company, ever since the 21st day of January, 1908, was a corporation duly organized and existing under the laws of the State of Nevada, and engaged in the banking business in Fairbanks, Alaska, until the 4th day of January, 1911, when it closed its doors.

That said corporation was known as the Fairbanks Banking Company until about the month of October, 1910, when it changed its name to the Washington-Alaska Bank.

II.

That immediately upon the closing of the doors of said bank upon the 4th day of January, 1911, F. W. Hawkins and E. H. Mack were appointed receivers by this Court to take charge of and administer the estate of said bank, and they immediately entered upon the performance of their duties as such.

III.

That in the month of March, 1911, the then receivers of the Washington-Alaska Bank, formerly Fairbanks Banking Company, intended to bring a suit or action in the District Court for the Territory of Alaska for the Fourth Division, against E. T. Barnette, who had been the president of said Fairbanks Banking Company, and a director thereof, from the time of its organization as a corporation on March 12, 1908, until it closed its doors on January 4th, 1911, and as such was active and influential in the management and control of said Fairbanks

Banking Company. [46]

IV.

That at the time of the suspension of said bank, said E. T. Barnette was not within the Territory of Alaska, but shortly thereafter, and in the month of February, 1911, returned to Fairbanks, Alaska, and entered into negotiations with the creditors and depositors of said Washington-Alaska Bank and with the then receivers of said bank, for the purpose of amicably adjusting all suits and causes of action that might exist against the said E. T. Barnette on account of his liability to the creditors of said bank on account of his management thereof from the time of its organization on the 12th day of March, 1908, until the 4th day of January, 1911.

V.

That as a result of said negotiations, and in full satisfaction of all liability of the said E. T. Barnette to the creditors of said Washington-Alaska Bank for and on account of the acts and wrongs done by him, if any, during said time that he was president and director thereof, the said E. T. Barnette and Isabelle Barnette, his wife, executed an instrument in writing in which the said E. T. Barnette admitted his liability to the creditors and depositors of said bank and promised and agreed to pay all of the depositors and holders of unpaid drafts of said bank in full any deficiency that might be found to exist upon the 18th day of November, 1914, between the amounts due said depositors and holders of unpaid drafts on the 4th day of January, 1911, with interest thereon at the rate of 6 per cent per annum from

said January 4, 1911, until the same should be paid, and the amount realized out of the property and assets of said Washington-Alaska Bank and paid to said depositors and holders of unpaid drafts.
[47]

VI.

That said Isabelle Barnette was and is the wife of said E. T. Barnette, and the said Isabelle Barnette joined in said instrument in writing because of her desire to aid her said husband in paying the creditors and depositors of said Washington-Alaska Bank.

VII.

That the said promises were made on the distinct understanding and agreement that no litigation would be instituted against the said E. T. Barnette or any other person or persons jointly liable with him for any act or deed done by him during the time that he was president and a director of said bank as aforesaid; and that, for the purpose of preventing any litigation, and as security for the faithful performance of the promises made by said E. T. Barnette and Isabelle Barnette, the said E. T. Barnette and Isabelle Barnette on the 18th day of March, 1911, with the knowledge, consent and approval of this Court, conveyed to the receivers of said bank, and the said receivers, by order of this Court, accepted a conveyance of title to an improved plantation consisting of 18,723 acres of land situate in the Republic of Mexico, and certain improved and income-producing business property and lots situate in the incorporated town of Fairbanks, Alaska, and

certain large interests in valuable association placer mining claims situate in the Fairbanks Recording Precinct, in said Territory of Alaska; all of which property belonged at the time of said conveyance to said E. T. Barnette and Isabelle Barnette, and were and are worth the sum of \$600,000, a sum greatly in excess of all the unpaid debts and liabilities of said bank.

VIII.

That in said deed of property situated in the Republic of Mexico, as well as in said deed to property situated in Alaska, it is expressly provided that if the depositors and holders of unpaid drafts are not paid in full by the 18th day of November, [48] 1914, either out of the property and assets of said Washington-Alaska Bank or otherwise, or by the said E. T. Barnette and Isabelle Barnette, said receiver may sell all or any part of said land at private sale for the best possible price obtainable; and that the monies and funds derived from the sale of said properties shall then be paid to the depositors and owners of unpaid drafts in an amount sufficient to pay their claims and demands in full; and that, if the proceeds derived from the assets of said bank and the amounts realized from the sale of said properties shall be insufficient to pay said depositors and owners of unpaid drafts in full, then the same is to be disbursed amongst said depositors and owners of unpaid drafts pro rata; and that if the amount derived from the sale of said property shall exceed the amount sufficient to satisfy said amounts in full, with interest as above set forth, then the balance is

to be returned to said E. T. Barnette and Isabelle Barnette. And it is further provided in said deeds that if, after applying the monies received from the property and assets of said Washington-Alaska Bank, and the sale of said properties mentioned in said deeds, and any monies obtained from George Edgar Ward and W. B. Biggs on account of an option given to them upon the 18th day of November, 1909, to purchase an undivided 49/100 interest in and to said Mexican property for the sum of approximately \$225,000, there shall still remain a balance due said depositors and holders of unpaid drafts, the said E. T. Barnette and Isabelle Barnette promise and agree to pay said balance in full.

IX.

That in said deed of the property situated in the Territory of Alaska, the receivers and their successors are authorized and empowered to take possession of the same and to receive and collect the rents, royalties and issues thereof, and disburse the same to the depositors and holders of unpaid drafts, under [49] the orders of this Court; and that, in the event the said E. T. Barnette and Isabelle Barnette and the said receivers or their successors deem it at any time advisable to sell any of the said real estate situated in Alaska, that the same may be done by said receivers, and the proceeds derived from such sale disbursed to the depositors and holders of unpaid drafts, under the orders of this Court.

X.

That the said receiver, plaintiff herein, holds a large amount of property belonging to said bank,

which is of great value, and has not been converted into money; and said property so held by him, and the property conveyed to the receivers by said E. T. Barnette and Isabelle Barnette, are more than sufficient to satisfy all the claims, demands and obligations of creditors of said Washington-Alaska Bank.

XI.

That on the 29th day of March, 1911, the then receivers of said Washington-Alaska Bank, agreed to accept in full satisfaction of the liability of said E. T. Barnette to the creditors of said Washington-Alaska Bank the said deeds of said property upon the terms and conditions thereof and the said promises of the said E. T. Barnette and Isabelle Barnette therein, and the said E. T. Barnette and Isabelle Barnette made, executed and delivered said deeds and made the said promises contained therein upon the distinct understanding and agreement that the same were in full satisfaction of all suits or causes of action then existing against said E. T. Barnette on account of any and all matters and things arising from his connection or management of the affairs of the said Fairbanks Banking Company, afterward known as Washington-Alaska Bank, and in full satisfaction of all liability of the said E. T. Barnette to the creditors of said Washington-Alaska Bank; and that said receivers accepted and received said promises and said deeds to said property, under order of this Court, in full satisfaction [50] of all claims and causes of action of whatsoever nature that existed against the said E. T. Barnette for and on account of his management of the affairs of said

bank from the 12th day of March, 1908, to the 4th day of January, 1911, and for and on account of his acts as president, and as a director of said corporation.

XII.

That the receivers of said Washington-Alaska Bank, before the delivery and acceptance of said deeds hereinbefore mentioned, intended to, and if said agreement and deeds had not been made, executed and delivered to said receivers as hereinbefore stated, would have instituted an action against said E. T. Barnette to recover from said E. T. Barnette the sum of \$13,000 which was paid to defendant R. C. Wood by said Fairbanks Banking Company on the 30th day of June, 1908.

XIII.

That the promises of said E. T. Barnette and Isabelle Barnette, and the deeds to the property hereinbefore mentioned, were given by the said E. T. Barnette and Isabelle Barnette upon the express understanding and agreement that the same were in full satisfaction of any liability of the said E. T. Barnette on account of the payment by said corporation of said sum of \$13,000.00 to said R. C. Wood, and in discharge of any causes of action against said E. T. Barnette for or on account thereof; and the same was accepted by the receivers of said bank upon the distinct understanding and agreement that the same was in full satisfaction of the liability of the said E. T. Barnette to the creditors of said bank on account of the payment of said sum of \$13,000 to said R. C. Wood, and in full discharge of said E. T.

Barnette on any causes of action that might arise therefrom.

XIV.

That the receivers have received from the rents, royalties and issues of the property situated in the Territory of Alaska the sum of \$31,400;

That the value of the property situated in the town of Fairbanks, Alaska, is the sum of \$25,000.

That the value of the mining property situate in the Fairbanks Recording District, Alaska, is the sum of \$20,000.

That the value of the Mexican property cannot be definitely determined at this time, but the same is of great value [51] and was, at the time of the execution of said deed, of the value of \$500,000.

XV.

This defendant alleges that the receivers have received full and complete satisfaction of any and all claims against this defendant for and on account of the payment to him by the Fairbanks Banking Company of the sum of \$13,000 from the said E. T. Barnette.

That this defendant, for a third further separate answer and defence, alleges:

I.

That the plaintiff is not entitled to any relief in this action for the reason that the said Washington-Alaska Bank has been guilty of laches in not sooner demanding payment from defendant.

That said Fairbanks Banking Company has acted as the owner of said 130 shares of stock ever since its organization, and the stockholders thereof by reason

of the same being owned by said bank have received the benefit thereof.

That this defendant has never been considered or regarded as a stockholder of said Fairbanks Banking Company by said corporation, and has in no way participated in the business of said corporation as an officer thereof since the 29th day of June, 1908, except for a short time he was a director thereof, and at no time has exercised the rights of a shareholder of said corporation.

That the defendant cannot be restored to the position that he was in at the time he received the \$13,000 from the Fairbanks Banking Company in the month of June, 1908; and the said Fairbanks Banking Company and the alleged receiver thereof have never tendered or offered to return or restore the stock which it is claimed by the plaintiff in this action belonged to this defendant, but which this defendant denies. [52]

That said corporation cannot be permitted to retain the shares of stock, and at the same time recover from the defendant herein said sum of \$13,000.

And, therefore, this defendant says that plaintiff is estopped by reason of the foregoing, from claiming the relief prayed for in his complaint.

WHEREFORE defendant asks that plaintiff take nothing by this action, and that he have judgment for his costs and disbursements herein.

A. R. HEILIG,
JOHN L. MCGINN,
Attorneys for Defendant.

R. C. WOOD, being first duly sworn, deposes and says: That I am the defendant in the above-entitled action that I have read the foregoing answer, know the contents thereof and believe the same to be true.

R. C. WOOD.

Subscribed and sworn to before me this 1st day of June, 1914.

[Seal]

ALBERT R. HEILIG,
Notary Public for Alaska.

Commission expires June 18, 1917.

[Indorsed]: No. 1894. District Court, 4 Division, Territory of Alaska. F. G. Noyes, Receiver, vs. R. C. Wood, Answer. Filed in the District Court, Territory of Alaska, 4th Div., Jun. 2, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy.
[53]

[Title of Court and Cause.]

Reply.

I.

Comes now the plaintiff and for reply to the first, further and separate answer and defense of said defendant says:

First. That he denies each and every allegation and statement therein contained except those hereinafter expressly admitted or otherwise denied.

Second. That he admits paragraphs I, II, III, IV, V, VI, VII, and VIII thereof.

Third. He admits that during the negotiations mentioned in said paragraphs I, II, III, IV, V, VI, VII, VIII the defendant was not in the Territory of Alaska and that he was neither in the State of

California or the State of Washington;

Fourth. He admits that there was issued to E. T. Barnette 260 shares of the capital stock of said corporation and to James W. Hill, 130 shares thereof.

Fifth. He admits that the defendant signed the agreement of March 16th, 1908, being exhibit number two attached to the plaintiff's complaint.

II.

For reply to the second further and separate answer and defense, plaintiff says:

First. He denies each and every allegation and statement therein contained, except as hereinafter expressly admitted;

Second. He admits paragraphs I and II thereof;
[54]

Third. He admits that E. T. Barnette was President of the Fairbanks Banking Company and a director thereof from the time of its organization on March 12th, 1908, until it closed its doors on January 4th, 1911, and that as such he was active and influential in the management and control of said bank;

Fourth. He admits that at the time of the suspension of said bank the said E. T. Barnette was not within the Territory of Alaska, and that in the month of February, 1911, he returned to Fairbanks, Alaska;

Fifth. He admits that Isabelle Barnette was and is the wife of the said E. T. Barnette and that she joined him in the deeds of conveyance therein referred to;

Sixth. He admits the conveyance to the former

receivers herein of title to the property referred to in said answer, and that he has taken possession thereunder of the property therein described and located in the Territory of Alaska;

Seventh. He admits that he has received the rents, royalties and issues of said property situated in the Territory of Alaska, and he alleges that the net amount thereof so received by him up to June 1st, 1914, is approximately \$31,478.65, less such reasonable charge as may be allowed for the collection thereof as provided in said conveyance.

III.

For reply to the third further and separate answer and defense, plaintiff says:

First. He denies each and every allegation and statement therein contained, except those herein-after expressly admitted or otherwise denied;

Second. As to whether or not the Fairbanks Banking Company or its former receivers ever tendered or offered to return or restore the stock which is claimed by the plaintiff in this action to belong to this defendant, this plaintiff has neither knowledge [55] nor information sufficient to form a belief and therefore denies the same;

Third. For further reply he says that the certificate of stock which was issued to this defendant, referred to in the complaint, was with the knowledge and consent of this defendant cancelled on the 30th day of June, 1908, as set forth in said complaint, and neither this plaintiff nor the former receivers of said bank have or had any authority to issue shares of the capital stock of said bank to this defendant.

Fourth. He further says that for the reason that defendant denies that said stock ever belonged to him or that he ever subscribed for the same, it would be now and at all times prior hereto would have been futile to offer said shares to this defendant;

Fifth. He further says that as charged in the complaint, no consideration ever passed from this defendant to said bank for said shares of stock, and that no consideration ever passed from this defendant to said bank in return for said Thirteen Thousand Dollars withdrawn from the assets of said bank by this defendant as charged in the complaint, and that by reason thereof there never was in the possession of said bank or of its former receivers nor is there now in the possession of plaintiff as receiver, anything to restore or return to this defendant.

WHEREFORE plaintiff prays that he have judgment against the defendant according to the complaint herein.

O. L. RIDER,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

F. G. Noyes, being first duly sworn, deposes and says: That as receiver, he is plaintiff named in the foregoing reply; that he has read said reply, knows the contents thereof, and believes the same to be true.

F. G. NOYES.

Subscribed and sworn to before me this 4th day of June, 1914.

L. D. BENNETT,
Notary Public in and for the Territory of Alaska.
My Commission expires June 24, 1916. [56]

Service of copy is hereby acknowledged this 4 day of June, 1914.

J. L. McGINN and

A. R. HEILIG,

Attorneys for Defendant.

[Indorsed]: No. 1894. In the District Court for the Territory of Alaska, Fourth Division. F. G. Noyes, as Receiver of the Washington-Alaska Bank, Plaintiff, vs. R. C. Wood, Defendant. Reply. Filed in the District Court, Territory of Alaska, 4th Div. Jun. 4, 1914. Angus McBride, Clerk. [57]

[Title of Court and Cause.]

Findings of Fact and Conclusions of Law.

BE IT REMEMBERED, that on the 8th day of June, 1914, the above-entitled cause came on regularly for trial before the Court without a jury, upon the issues as joined between the plaintiff and the defendant; the Honorable F. E. Fuller, Judge of said court, presiding; the plaintiff appearing in person and by his attorney O. L. Rider, and the defendant appearing in person and by his attorneys John L. McGinn and A. R. Heilig.

AND THEREUPON the plaintiff and defendant in open court agreed to submit the issues herein for final determination upon the testimony adduced and the admissions of the parties contained in the pleadings herein, and upon the testimony, so far as the same is applicable to said issues, heretofore introduced and received by the Court in cause number 1756 entitled, "F. G. Noyes, receiver of the Washington-Alaska Bank, a corporation, plaintiff, vs. J. A.

Jesson et al., defendants," pending in said court.

AND THEREUPON the Court, after hearing the allegations, testimony and proofs of the respective parties, and the arguments of counsel, and being fully advised in the premises, does hereby make and file, as constituting its decisions in said cause, the following Findings of Fact and Conclusions of Law:

I.

That the Washington-Alaska Bank, of which the plaintiff is receiver, was incorporated under the laws of the State of Nevada on the 21st day of January, 1908, with an authorized capital [58] stock of \$300,000.00 divided into 3,000 shares of the par value of \$100.00 each; that said bank was incorporated under the name of the Fairbanks Banking Company; and that subsequently, by amendment to its Articles of Incorporation, said name was changed to Washington-Alaska Bank.

II.

That said bank commenced business in the town of Fairbanks, Alaska, on the 16th day of March, 1908, with a subscribed capital of \$206,000.00, part of which was paid for in cash, part in property, and the balance by the promissory notes of the subscribers.

III.

That prior to the 21st day of January, 1908, subscriptions for said capital stock were circulated, and the following persons among others, subscribed for shares thereof, to wit, E. T. Barnette, 440 shares; R. C. Wood, 220 shares; James W. Hill, 220 shares; the name of R. C. Wood being subscribed thereto by

said E. T. Barnette.

IV.

That prior to the incorporation of said bank, the said Barnette, Hill and Wood, as copartners, were conducting a banking business in said town of Fairbanks under the firm name and style of Fairbanks Banking Company, which said company in December, 1907, owing to financial difficulties, was unable to meet its obligations and was compelled to suspend business and close its doors, and was at the time of the organization of said corporation, conducting business upon a scrip basis, and the securities belonging to the firm were in the hands of trustees to secure such scrip.

V.

That said corporation was organized, among other things, for the purpose of taking over the business and affairs of said partnership and assuming the outstanding obligations. [59]

VI.

That the capital of said partnership was \$200,000.00, which belonged to said Barnette, and the agreement existing between said partners was that the profits of said partnership were to be divided, one-half to said Barnette, and one-fourth each to said Hill and Wood.

VII.

That thereafter, and in the fore part of January, 1908, a large number of business, professional and mining men of the Fairbanks Recording District, Alaska, met in the town of Fairbanks, Alaska, for the purpose of organizing a corporation to purchase and

take over and absorb the business of the Fairbanks Banking Company, a partnership, and at said meeting negotiations were begun by said proposed incorporators with said copartnership for the purchase of the same. That at said meeting a committee was appointed to go into the details of the reorganization of the Fairbanks Banking Company, and to report a basis upon which the business should be taken over, two of the members of this committee having been members of the committee of depositors which had in December examined the assets.

VIII.

That said committee met on the 5th day of January, 1908, and, after investigating the affairs of the bank, made the following report to be presented for the consideration of the proposed new corporation;

(a) That the issued stock for the proposed new corporation be as of date February 15, 1908; that notes be taken for all deferred payments; that the same bear interest at the rate of one per cent per month from February 15, 1908, until paid; that twenty-five per centum of the unpaid for stock be due and payable on or before June 1st, 1908, and that the balance be due and payable on or before July 1st, 1908. [60]

(b) That Captain E. T. Barnette and James W. Hill, with such associates as they may require, prepare a subscription list.

(c) That the amounts subscribed by any person be left to that person, and in case of over-subscription should be reduced proportionately.

(d) That the notes, properties and securities of

the Fairbanks Banking Company, the old institution, examined by its present acting board of trustees and on which a valuation of \$288,000.00 in excess of its liabilities was placed, be accepted.

(e) That all notes, properties and securities which said board of trustees placed in the No. 3, or doubtful class remain the property of the old institution.

(f) That all interest on existing loans as of December 19, 1907, be computed to February 15, 1908, and that the amount of such accrued interest be placed to the credit of the old institution on the books of the new corporation, and that the same be payable on or before December 31, 1908.

(g) That should James W. Hill and R. C. Wood not take the full forty-four thousand dollars in stock in the new corporation, the balance of the amount not so taken to be paid to them not later than July 1st, 1908.

(h) That the proposition of Captain E. T. Barnette to leave on deposit with the new corporation the sum of two hundred thousand dollars, without interest for one year, be accepted, and that it be the understanding that such deposit will secure said new corporation against any adverse decision of the Court in the Caustens vs. Barnette suit in so far as such decision may decrease the value of the Gold Bar Lumber Company property as accepted by the present board of trustees.

(i) That the officers of the new corporation be a president, vice-president, second vice-president,

cashier, assistant cashier, treasurer, and secretary.
[61]

(j) That the number of the Board of Directors be twelve, four to be elected for six months, four for twelve months, and four for eighteen months or until their respective successors are duly elected and qualified.

(k) That dividends be declared semi-annually on June 30, and December 31.

IX.

That said report was, on January 6th, 1908, submitted to said proposed incorporators, and at said meeting the said report was read, and passed on section by section as read, and on motion duly made and carried was adopted and ordered kept as a part of the records of said meeting.

X.

That at said meeting a subscription list, a copy of which is set forth in paragraph 3 of the amended complaint in this cause, was presented and signed by said proposed incorporators, setting forth the amount for which each respectively subscribed.

XI.

That at said meeting it was also agreed on behalf of the Fairbanks Banking Company, a copartnership, that said partnership would turn over to said corporation the property of said Fairbanks Banking Company, a partnership, on the terms specified in said report, and said proposed incorporators in behalf of said proposed corporation, in consideration thereof, agreed to assume the liabilities of said partnership.

XII.

That said Fairbanks Banking Company, a corporation, became such on the 21st day of January, 1908. That on the 8th day of February, 1908, a meeting of the subscribers of the capital stock of the Fairbanks Banking Company was held for the purpose, among others, of obtaining notes of the subscribers for the stock subscribed by them, and, at said meeting, said stock notes were subscribed by said subscribers of stock and delivered to said corporation. [62]

That at the time of said meeting the Articles of Incorporation of said Fairbanks Banking Company had not been received from the State of Nevada, and for the purpose of expediency it was deemed advisable to elect a Board of Directors, and twelve directors were elected at said meeting, and it was agreed that said Board of Directors should act as such until the arrival of the Articles of Incorporation, when a formal meeting would be held and proper by-laws be adopted.

XIII.

..That said Articles of Incorporation did not arrive in Fairbanks until sometime in the month of March, 1908, and immediately thereafter a meeting of the stockholders of the Fairbanks Banking Company, a corporation, was called, and at said meeting said stockholders, among other things, adopted by-laws and elected a Board of Directors; and also passed a resolution to the effect that the matter of taking over the property of the Fairbanks Banking Company, a partnership, be left to the Board of Directors.

That on the 12th day of March, 1908, at said meet-

ing of the subscribers to said capital stock, said subscriptions were accepted by them and the above-named Barnette, Hill and Wood, together with the other subscribers, were declared to be stockholders of the said corporation. The defendant Wood was not present at said meeting, but he was notified of the result of the same by the said Hill.

XIV.

Subsequently, at a meeting of the stockholders of said corporation, it was resolved that the matter of taking over the business and affairs of said partnership be left to the Board of Directors. Thereafter, on March 12, 1908, at a meeting of the Board of Directors, said matter was considered by them and the resolutions of the proposed stockholders, set out in Finding VIII hereof, were by said directors adopted and approved, except that [63] the resolution providing for the payment of accrued interest up to February 15, 1908, was by them amended so as to read "March 15, 1908." At said meeting it was ordered by said Board of Directors that stock issue to said Barnette, Hill and Wood in exchange for the property received from them by said corporation, as follows: Barnette, 440 shares; Hill, 220 shares; Wood, 220 shares.

XV.

That on the 16th day of March, 1908, a written agreement was entered into between said corporation and said partners, and on the same day the same was signed by the said Barnette and Hill, and also on behalf of said bank by its president and secretary, wherein the valuation of the resources of said part-

nership was fixed at \$790,940.31 and its liabilities at \$538,940.31, leaving an excess of \$252,000.00 belonging to the said Barnette, Hill and Wood, in which said agreement the said Barnette, Hill and Wood agreed to accept stock of the corporation at its par value for the amount of assets in excess of said liabilities, except \$200,000.00 thereof should be placed to the credit of the said Barnette as a special deposit with said corporation upon the terms therein stated. By the terms of said agreement the amount of stock to be issued to Barnette, Hill and Wood was fixed at \$52,000.00 instead of \$88,000.00 as contemplated by said resolution and subscription, thus entitling Barnette to 260 shares and Wood and Hill each to 130 shares. A copy of said agreement is annexed to plaintiff's complaint and marked "Exhibit One."

XVI.

That at the time said agreement was entered into, the said Barnette was president of the said corporation and also a member of the Board of Directors; the said Hill was a member of its executive committee and also its vice-president, and the said Wood was its cashier. That said Barnette, Hill and Wood were also members of the partnership with which the said corporation [64] contracted respecting the matters set forth in said agreement, and were each personally interested therein adverse to said corporation.

XVII.

That the matter of preparing the papers for the transfer of said property belonging to said partnership to said corporation was, by the Board of Di-

rectors, left to the executive committee, and the said executive committee examined the affairs of said partnership, and, under their direction, said written agreement was prepared and afterward submitted to the Board of Directors for approval, and by them approved.

XVIII.

That according to the by-laws of said corporation, the said executive committee had the same powers as the Board of Directors, subject to the approval of their acts by said Board of Directors.

XIX.

That at the time said written agreement was signed and executed, and during all of the negotiations leading up to the making of the same, the defendant Wood was in Seattle, Washington, but he was advised fully concerning the same by the said Hill by letter and by telegram.

XX.

That prior to the return of said Wood to Fairbanks, to wit, on the 29th day of February, 1908, he offered to sell his stock in said corporation and to take in payment therefor part cash and a note for the balance, to be secured by said stock as collateral security.

XXI.

That the defendant Wood returned to Fairbanks, Alaska, some time in the month of April, 1908, and, upon his return, he signed said written agreement so entered into as aforesaid, knowing [65] that the same contained said clause requiring him to take stock for his share of the assets of said partnership

so transferred to said corporation in excess of the liabilities thereof as aforesaid, and also knowing that the same did not provide for the payment of said accrued interest, but with an oral understanding between himself and the officers of said bank that he might have, in accordance with said resolution, until July 1st, 1908, to elect either to take stock in said corporation or cash for his share of the assets of said partnership so transferred to said corporation.

XXII.

That of the loans and discounts transferred by said partnership to said corporation, a large amount were then past due, of which then past due paper the sum of \$69,908.94 now remains in the hands of the receiver unpaid and uncollectible, which said loans and discounts were accepted by the directors of said corporation at their face value, and the same were included in those on which the accrued interest referred to in said resolution, was afterward computed.

XXIII.

That of said notes so past due as aforesaid, there were two executed by the Tanana Electric Company in the sum of \$27,997.38, which depended for their value upon the existence of an alleged guaranty of the Scandinavian-American Bank to make advancements sufficient to cover the same; that said alleged guaranty never had any existence in fact, and the claim therefor had been repudiated by said Scandinavian-American Bank prior to the time said note was accepted by said Board of Directors, and said repudiation was known to the members of said board. That said notes are still unpaid, and the same was

at all times carried on the books of the said Washington-Alaska Bank, formerly Fairbanks Banking Company, as an asset in the sum of \$27,997.38. [66]

XXIV.

That said Board of Directors and the officers of said bank accepted said notes of the Tanana Electric Company and paid therefor the sum of \$27,997.38.

XXV.

That among the other assets of said partnership so accepted by said officers and directors was four-fifths of the capital stock of the Gold Bar Lumber Company, a corporation existing in the State of Washington, which said stock was accepted and paid for at the valuation of \$341,949.00, and said stock was at all times during the existence of said corporation carried as an asset in said sum.

XXVI.

That at the first meeting of the Board of Directors, held on the 12th day of March, 1908, the defendant Wood was elected cashier of said bank, at which time he was then in the city of Seattle, Washington, as aforesaid. Immediate notice was given to him of said election.

XXVII.

That said Wood accepted said office of cashier while in the said city of Seattle, and, on the 16th day of March, 1908, entered upon the discharge of his duties as such cashier, and, upon his return to said Fairbanks in April, 1908, as aforesaid, entered actively upon such duties and continued to so act until June 29, 1908, when he tendered his resignation as such cashier, and the same was accepted by the

Board of Directors to be effective at the close of business on June 30, 1908, and one B. R. Dusenbury, who was then assistant cashier, was elected to succeed Wood as cashier.

XXVIII.

That at the time said Wood tendered his resignation as cashier, as aforesaid he demanded that there be paid to him the [67] amount of his interest in said partnership assets, to wit, \$13,000.00

XXIX.

That a certificate for 130 shares of the capital stock of said corporation had been written up in the name of the defendant Wood, of the par value of \$13,000.00, but the same was never detached from the stock book. That said 130 shares were carried on the books of said bank as outstanding stock from March 16, 1908, to June 30, 1908.

XXX.

That on the 30th day of June, 1908, with the knowledge, consent and approval of the officers and directors of said bank, a certificate of deposit was issued to and accepted by the said Wood in the sum of \$13,000.00, in lieu of said stock, which said certificate was signed by the said B. R. Dusenbury as assistant cashier prior to the time when the said resignation of the said Wood as cashier became effective, and said shares of capital stock were on the same day charged to treasury stock on the books of said bank.

XXXI.

That subsequently the said Wood drew out in cash from the funds of said bank the amount of the said

certificate of deposit, to wit, \$13,000.00.

XXXII.

That of the notes accepted from said partnership, as aforesaid, and paid for by said corporation, there were charged on December 31, 1907, by said partnership on the books of said partnership to an account known as "doubtful account" the sum of \$22,979.99, and said doubtful account, so including said notes in said amount, was then depreciated on the said books to the amount of thirty-three and one-third per cent thereof, which said notes were accepted by said corporation and paid for by them in the [68] amount aforesaid, to wit, \$22,979.99, all of which said notes were then past due, and of which there still remains unpaid and uncollectible the sum of \$12,860.61.

XXXIII.

That on March 23, 1908, pursuant to said resolution of the said Board of Directors adopted on March 12, 1908, the accrued interest on said notes so transferred to said corporation was computed to March 15, 1908, in the sum of \$39,642.81, and one-half thereof was placed to the credit of said Barnette, and one-fourth thereof each to the credit of said Hill and Wood on the books of said corporation, and subsequently the same was paid to the said Barnette, Hill and Wood in cash.

XXXIV.

That of said interest so paid to said Barnette, Hill and Wood as aforesaid, approximately \$7,500.00 thereof was never collected by said bank.

XXXV.

That at the time the said Wood so surrendered his

stock as aforesaid, on June 30, 1908, the total assets of said corporation, as shown by its books were \$1,251,924.96 and its total liabilities were \$1,290.843.-43 including its outstanding capital stock in the sum of \$201,600.00, including the \$13,000.00 of stock of the defendant Wood. That among said assets the capital stock of the Gold Bar Lumber Company was carried at a valuation of \$341,949.00, and of its loans and discounts \$75,699.61 were then past due and are still unpaid, of which amount \$69,908.94 were taken over from said partnership, included in which was the above-mentioned notes of the Tanana Electric Company in the sum of \$27,997.38.

XXXVI.

That at the time said partnership assets were transferred to said corporation as aforesaid, said Gold Bar Lumber Company was closed down and remained so until the fall of 1908; that [69] immediately prior to its closing down, it had been operated at a loss; that no dividends have ever been paid on the capital stock of said Gold Bar Lumber Company during the time the same was owned by said bank.

XXXVII.

That subdivisions 5 and 6 of Article XII of the by-laws of said corporation, adopted at the stockholders meeting held March 12, 1908, provided that all issued and outstanding stock of the company that may be donated, to, or purchased by the company, or which shall revert by reason of failure to pay for the same, shall be treasury stock, and shall be held subject to the disposal of the action of the Board of

Directors. Said stock shall neither vote nor participate in dividends while held by the company. The Board of Directors shall be given the first option to purchase for the corporation the stock of any stockholder, and shall be entitled to purchase the same provided said Board of Directors shall offer to pay to said stockholder the same amount as he might obtain from any other person.

XXXVIII.

That the laws of the State of Nevada, under which said corporation was organized, provide that it shall not be lawful for the directors of a corporation organized thereunder to divide, withdraw or in any way pay to the stockholders any part of the capital stock of the company. Said laws further provide that a corporation may purchase its own stock in the manner provided therein, and that if the capital be decreased not in the manner provided by said laws the stockholders shall be liable for such sums as they may receive of the amount so reduced. None of the things required to be done in the matter of the purchase of stock by said corporation, or to reduce the capital thereof, were done in the surrender and purchase of the stock of the said Wood. [70]

XXXIX.

That on said June 30, 1908, the said Fairbanks Banking Company had no surplus nor undivided profits with which to purchase the stock of the said Wood and the same was paid for out of its capital.

XL.

That the taking back of said stock and the payment therefor as aforesaid was illegal, wrongful, and

in violation of the laws of the State of Nevada under which said corporation was organized.

XLI.

That pursuant to the agreement heretofore referred to between the said Fairbanks Banking Company and the said partnership formerly existing between the said Barnette, Hill and Wood, the said sum of \$200,000.00 to be paid to the said Barnette was placed to his credit on the books of said corporation as a special deposit, and subsequently the entire sum thereof was paid to the said Barnette in cash and drawn out by him from the funds of said bank.

XLII.

That the assets of the said bank now in the hands of the receiver are insufficient to pay its liabilities, and the amount of such liabilities is more than \$470,000.00 in excess of the value of said assets.

Conclusions of Law.

Upon the foregoing Findings of Facts the Court finds as Conclusions of Law as follows:

That the plaintiff take nothing against the defendant R. C. Wood on the cause of action stated in the complaint, and that said action be dismissed.

Dated Fairbanks, Alaska, this 6th day of July, 1914.

Entered in Court Journal No. 2, page 27, at Iditarod, Alaska.

Entered in Court Journal No. 13, page 6.

F. E. FULLER,

Judge of the District Court, Territory of Alaska,
Fourth Division, Fairbanks. [71]

Service of copy is hereby acknowledged this 15th day of July, 1914.

JOHN L. MCGINN,
A. R. HEILIG,
Attorneys for Defendant.

[Indorsed]: No. 1894. In the District Court for the Territory of Alaska, Fourth Division. F. G. Noyes, Receiver of the Washington-Alaska Bank, a Corporation, Plaintiff, vs. R. C. Wood, Defendant. Findings of Fact and Conclusions of Law. Filed in the District Court, Territory of Alaska, Fourth Division, Jul. 6, 1914. Angus McBride, Clerk. [72]

*In the District Court for the Territory of Alaska,
Fourth Judicial Division.*

No. 1894.

F. G. NOYES, Receiver of Washington-Alaska Bank, a Corporation, Organized Under the Laws of the State of Nevada,

Plaintiff,

vs.

R. C. WOOD,

Defendant.

Decree.

BE IT REMEMBERED that on the 8th day of June, A. D. 1914, the above-entitled cause came on regularly for trial before the Court without a jury upon the issues as joined between the plaintiff and the defendant; the Honorable F. E. Fuller, Judge of

said court, presiding; the plaintiff appearing in person and by his attorney, O. L. Rider, and the defendant appearing in person and by his attorneys John L. McGinn and A. R. Heilig.

And thereupon the plaintiff and defendant in open court agreed to submit the issues herein for final determination upon the testimony adduced, the admissions of the parties contained in the pleadings herein, and upon the testimony, so far as the same is applicable to said issues, heretofore introduced and received by the Court in cause number 1756 entitled "F. G. Noyes, Receiver of the Washington-Alaska Bank, a corporation, plaintiff, vs. J. A. Jessen et al., defendants," pending in said court.

And thereupon the Court, after hearing the arguments of respective counsel and upon consideration of said pleadings and of said testimony, and being fully advised in the premises, did, on the 6th day of July, 1914, make and file his findings of fact and conclusions of law upon the issues herein;

And thereupon, upon consideration thereof, it is by the Court ordered, adjudged and decreed that the plaintiff take nothing against the defendant, R. C. Wood, by reason of his complaint herein, and that said action be and the same is hereby dismissed at the cost of the plaintiff. [73]

All of which is now finally ordered, adjudged and decreed, this 6th day of July, 1914.

F. E. FULLER,
Judge of the District Court, Territory of Alaska,
Fourth Division.

Entered in Court Journal No. 2, page 37, Iditarod, Alaska.

Entered in Court Journal No. 13, page 9, Fairbanks, Alaska.

Service of copy accepted this 15 day of June, 1914.

J. L. McGINN,

A. R. HEILIG,

Attorneys for Defendant.

[Indorsed]: No. 1894. F. G. Noyes, Receiver, etc., Plaintiff, vs. R. C. Wood, Defendant. Decree.

Filed in the District Court, Territory of Alaska, 4th Div. Jul. 6, 1914. Angus McBride, Clerk.
[74]

[Title of Court and Cause.]

Plaintiff's Bill of Exceptions.

Exception No. 1.

BE IT REMEMBERED: That on the 6th day of July, 1914, the Court made and entered in the above-entitled cause his Findings of Fact and Conclusions of Law, which said Conclusions of Law are as follows, to wit:

“That the plaintiff take nothing against the Defendant R. C. Wood, on the cause of action stated in the complaint, and that said action be dismissed.”

To the making and entering of which said Conclusions of Law the plaintiff at the time duly excepted and still excepts for the reason that the same is contrary to the facts found by the Court and contrary to law.

Exception No. 2.

BE IT FURTHER REMEMBERED: That on the 6th day of July, 1914, the Court made and entered its Decree in the above-entitled cause in con-

formity with said Conclusions of Law, decreeing that the plaintiff take nothing against the defendant R. C. Wood and that said cause of action be dismissed, to the making and entering of which said Decree the plaintiff at the time duly excepted and still excepts for the reason that the same is contrary to the facts found by the Court and contrary to law.

And now, in furtherance of justice and in order that the foregoing Exceptions may become a part of the record in this case, and within the time allowed by law to prepare, serve, file, and have settled his Bill of Exceptions in this case, the plaintiff [75] herewith presents the foregoing Bill of Exceptions in the above-entitled cause and prays that the same may be settled, signed and allowed by the Judge of this court in the manner prescribed by law.

O. L. RIDER,

Attorney for Plaintiff.

Service of the foregoing Bill of Exceptions duly accepted this 6th day of July, 1914.

A. R. HEILIG,

JOHN L. MCGINN,

Attorneys for Defendant.

[Title of Court and Cause.]

**Order Settling and Allowing Plaintiff's Bill of
Exceptions.**

And now, on this 6th day of July, 1914, the above-named plaintiff, in the manner prescribed by law, and the practice of this Court having presented to this Court for allowance and settlement his Bill of

Exceptions in the above-entitled cause, the plaintiff appearing by his attorney, O. L. Rider, and the defendant appearing by his attorney John L. McGinn,

And it appearing to the Court that said Bill of Exceptions has been heretofore, and within the time allowed by law, served upon the attorney for said defendant in due form, and that the same has been filed with the clerk of this court within the time allowed by law, and that no amendments thereto have been filed or claimed by the defendant, and that the right to file amendments thereto has been waived by the defendant, and that the plaintiff and defendant through their respective counsel have agreed that said Bill of Exceptions may be presented for settlement and allowance at this time; [76]

And it further appearing that said Bill of Exceptions is true and correct in all particulars and contains a true and correct statement of the exceptions taken in due time by the plaintiff,

IT IS HEREBY ORDERED that the foregoing Bill of Exceptions be, and the same is hereby, allowed, settled, approved and signed as Plaintiff's Bill of Exceptions in said cause, and the same is hereby ordered filed with the clerk of this court and made a part of the record in this cause.

F. E. FULLER,

District Judge.

Service of copy of the foregoing Order allowing and settling plaintiff's Bill of Exceptions is duly accepted this 6th day of July, 1914.

A. R. HEILIG,

JOHN L. MCGINN,

Attorneys for Defendant.

Entered in Court Journal No. 2, page 42, Iditarod, Alaska.

Entered in Court Journal No. 13, page 3.

[Indorsed]: No. 1894. In the District Court Within and for the Territory of Alaska, Fourth Judicial Division. F. G. Noyes, Receiver, etc., Plaintiff, vs. R. C. Wood, Defendant. Plaintiff's Bill of Exceptions and Order Settling and Allowing the Same. Filed in the District Court, Territory of Alaska, 4th Div. Jul. 6, 1914. Angus McBride, Clerk. [77]

[Title of Court and Cause.]

**Petition for Allowance of Appeal and Order
Granting Same.**

To the Honorable F. E. FULLER, District Judge:

The above-named plaintiff, F. G. Noyes, receiver of the Washington-Alaska Bank, a corporation, feeling himself aggrieved by the decree made and entered in this cause on the 15th day of June, A. D. 1914, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, California.

And your petitioner further prays that the proper order touching the security required of him to per-

fect his appeal be made.

O. L. RIDER,
Attorney for Plaintiff.

Service of the foregoing petition for allowance of appeal is hereby admitted at Fairbanks, Alaska, this 28 day of January, 1915, by receipt of a copy thereof.

JOHN L. MCGINN and

A. R. HEILIG,

Attorneys for Defendants.

The foregoing petition on appeal is granted and the appeal allowed upon giving bond for costs conditioned as required by law in the sum of \$500.00.

CHARLES E. BUNNELL,

Judge of the District Court for the Territory of Alaska, Fourth Judicial Division.

Entered in Court Journal No. 13, page 29. [78]

[Indorsed]: No. 1894. F. G. Noyes, Receiver, etc., vs. R. C. Wood, Defendant. Petition for Allowance of Appeal and Order Granting Same. Filed in the District Court, Territory of Alaska, 4th Div. Jan. 28, 1915. Angus McBride, Clerk. [79]

[Title of Court and Cause.]

Order Allowing Appeal.

On motion of O. L. Rider, attorney for the above-named plaintiff, F. G. Noyes, receiver of the Washington-Alaska Bank, a corporation, it is ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree heretofore filed and entered herein, be, and the same is here allowed, and that a certified transcript of the record proceedings and papers upon which said decree was based, duly authenticated, be forthwith

transmitted to the said United States Circuit Court of Appeals.

It is further ordered that the bond for costs on appeal be, and the same is hereby, fixed at the sum of \$500.00.

Dated at Fairbanks, Alaska, Fourth Judicial Division of Alaska, this 28th day of January, 1915.

CHARLES E. BUNNELL,
District Judge.

Entered in Court Journal No. 13, page 29.

Service of the foregoing Order Allowing Appeal admitted and a true copy thereof received this 28 day of January, 1915.

JOHN L. McGINN and
A. R. HEILIG,
Attorneys for Defendants.

[Indorsed]: No. 1894. F. G. Noyes, Receiver, etc., Plaintiff, vs. R. C. Wood, Defendant. Order Allowing Appeal. Filed in the District Court, Territory of Alaska, 4th Div. Jan. 28, 1915. Angus McBride, Clerk. [80]

[Title of Court and Cause.]

Assignments of Error.

And now, on this 28 day of January, A. D. 1915, comes the above-named plaintiff by his attorney, O. L. Rider, and says that the decree entered in the above cause on the 6th day of July, A. D. 1914, is erroneous and unjust to the plaintiff, and he files with his petition on appeal the following assignments of error upon which he will rely on his appeal from said decree made by this Honorable Court

upon the 6th day of July, A. D. 1914, in the above-entitled cause:

I.

Because the Court erred in making and entering in the above-entitled cause the following conclusions of law:

“That the plaintiff take nothing against the defendant, R. C. Wood, on the cause of action stated in the complaint, and that said action be dismissed.”

II.

Because the Court erred in making and entering a decree herein that the plaintiff take nothing against the defendant, R. C. Wood by reason of his complaint and that said action be dismissed at the cost of the plaintiff.

III.

Because the Court erred in refusing to make and enter judgment and decree in favor of the plaintiff and against the defendant for the sum of \$13,000.00, with interest and costs as prayed for in the petition.

WHEREFORE, the plaintiff prays that said decree be reversed and that the Circuit Court of Appeals shall render a proper [81] decree on the record as prayed for by the petition, and that the plaintiff have such other and further relief as may be equitable in the premises.

O. L. RIDER,

Attorney for Plaintiff.

Received copy Jan. 28, 1915.

JOHN L. MCGINN and

A. R. HEILIG,

Attys. for Deft.

[Indorsed]: No. 1894. F. G. Noyes, Receiver, etc., Plaintiff, vs. R. C. Wood, Defendant. Plaintiff's Assignment of Errors. Filed in the District Court, Territory of Alaska, 4th Div. Jan. 28, 1915. Angus McBride, Clerk. [82]

[Title of Court and Cause.]

Citation [Copy].

United States of America,
Territory of Alaska,—ss.

The President of the United States of America, to
R. C. Wood, Greeting:

You are hereby notified that in a certain case in equity in the District Court for the Territory of Alaska, Fourth Judicial Division, wherein F. G. Noyes, Receiver of Washington-Alaska Bank, a corporation, is plaintiff, and R. C. Wood is defendant, an appeal has been allowed therein to the United States Circuit Court of Appeals for the 9th Circuit at San Francisco, California; and you are hereby cited and admonished to be and appear in said Circuit Court of Appeals at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the judgment and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable EDWARD D. WHITE,
Chief Justice of the Supreme Court of the United

States, this 28th day of January, one thousand nine hundred and fifteen.

CHARLES E. BUNNELL,

District Judge, Fourth Judicial Division, Territory of Alaska.

[Seal]

Attest: ANGUS McBRIDE,

Clerk.

Service of the foregoing citation is hereby accepted and receipt of copy acknowledged this 29 day of January, 1915.

JOHN L. MCGINN and

A. R. HEILIG,

Attorneys for Defendant.

[Endorsed]: No. 1894. F. G. Noyes, Receiver, etc., Plaintiff, vs. R. C. Wood, Defendant. Citation. Filed in the District Court, Territory of Alaska, 4th Div. Jan. 28, 1915. Angus McBride, Clerk. [83]

[Title of Court and Cause.]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we, F. G. Noyes, Receiver of the Washington-Alaska Bank, a corporation, as principal, and Geo. W. Pennington and A. Bruning, as sureties, are held and firmly bound unto the defendant in the full sum of five hundred (\$500.00) dollars, to be paid to said defendant, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 20th day of February, A. D. 1915.

WHEREAS, lately at a term of the District Court in the Territory of Alaska, Fourth Division, in a suit pending in said Court between F. G. Noyes, Receiver of the Washington-Alaska Bank, a corporation organized under the laws of the State of Nevada, as plaintiff, and R. C. Wood, as defendant, a decree was rendered in favor of the plaintiff in part and against the plaintiff in part, and said plaintiff having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals to reverse the decree in the aforesaid cause in certain particulars, and a citation is about to be issued citing and admonishing the defendant to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, California; and

WHEREAS, the above-named plaintiff has obtained an order from said Court that the bond on appeal be fixed in the sum of five hundred dollars for costs and damages on appeal. [84]

Now, the condition of the above obligation is such that if the said plaintiff shall prosecute his said appeal to effect and shall answer all damages and costs that may be awarded against him if he fails to make his plea good, then this obligation is to be void, otherwise to remain in force and effect.

F. G. NOYES,

By R. F. ROTH, Atty.

Principal.

GEO. W. PENNINGTON,

A. BRUNING,

Sureties.

United States of America,
Territory of Alaska,—ss.

Geo. W. Pennington and A. Bruning, whose names are subscribed to the above and foregoing undertaking as sureties, being first duly sworn, each for himself doth depose and say: That he is a resident of the Territory of Alaska, that he is not an attorney or counsellor at law, marshal, clerk of any court, or other officer of any court; that he is worth the sum of five hundred (\$500.00) dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

GEO. W. PENNINGTON.

A. BRUNING.

Subscribed and sworn to before me this 20 day of February, 1915.

[Seal]

JOHN F. DILLON,

Commissioner and Ex-officio Justice of the Peace,
Fairbanks Precinct.

The sufficiency of the sureties on the foregoing bond approved this 20th day of February, A. D. 1915.

CHARLES E. BUNNELL,

District Judge.

[Endorsed]: No. 1894. In the District Court of the United States for the Territory of Alaska. F. G. Noyes, Receiver, &c., Plaintiff, vs. R. C. Wood, Defendant. Bond on Appeal. Filed February 20, 1915. Angus McBride, Clerk. By P. R. Wagner, Deputy. [85]

[**Certificate of Clerk U. S. District Court to
Transcript of Record, etc.**]

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, Angus McBride, Clerk of the District Court, Territory of Alaska, fourth division, do hereby certify, that the foregoing, consisting of eighty-five (85) typewritten pages, numbered from 1 to 85 inclusive, constitutes a full, true and correct transcript of the record on appeal in cause No. 1894, entitled: F. G. Noyes, receiver of Washington-Alaska Bank, a corporation, organized under the laws of the State of Nevada, plaintiff, vs. R. C. Wood, defendant, wherein F. G. Noyes, receiver of Washington-Alaska Bank, a corporation, organized under the laws of the State of Nevada, is plaintiff and appellant, and R. C. Wood, is defendant and appellee, and was made pursuant to and in accordance with the praecipe of the plaintiff and appellant filed in this action and made a part of this transcript, and by virtue of the citation issued in said cause, and is the return thereof in accordance therewith.

And I further certify that the costs of preparing said transcript and this certificate, amounting to thirty-three and 75/100 dollars (\$33.75) has been paid to me by counsel for plaintiff and appellant in said action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Fair-

banks, Alaska, this 25th day of February, 1915.

[Seal]

ANGUS McBRIDE,
Clerk District Court, Territory of Alaska, Fourth
Division. [86]

[Endorsed]: No. 2594. United States Circuit
Court of Appeals for the Ninth Circuit. F. G.
Noyes, as Receiver of Washington-Alaska Bank, a
Corporation, Appellant, vs. R. C. Wood, Appellee.
Transcript of Record. Upon Appeal from the
United States District Court for the Territory of
Alaska, Fourth Division.

Received March 18, 1915.

F. D. MONCKTON,
Clerk.

Filed April 1, 1915.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Title of Court and Cause.]

Citation [on Appeal (Original)].

United States of America,
Territory of Alaska,—ss.

The President of the United States of America, to
R. C. Wood, Greeting:

You are hereby notified that in a certain case in
equity in the District Court for the Territory of
Alaska, Fourth Judicial Division, wherein F. G.

Noyes, Receiver of Washington-Alaska Bank, a corporation, is plaintiff, and R. C. Wood is defendant, an appeal has been allowed therein to the United States Circuit Court of Appeals for the 9th Circuit at San Francisco, California; and you are hereby cited and admonished to be and appear in said Circuit Court of Appeals at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the judgment and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 28th day of January, one thousand nine hundred and fifteen.

CHARLES E. BUNNELL,
District Judge, Fourth Judicial Division, Territory
of Alaska.

[Seal]

Attest: ANGUS McBRIDE,
Clerk.

Service of the foregoing citation is hereby accepted and receipt of copy acknowledged this 29 day of January, 1915.

JOHN L. MCGINN and
A. R. HEILIG,
Attorneys for Defendant.

[Endorsed]: No. 1894. F. G. Noyes, Receiver, etc., Plaintiff, vs. R. C. Wood, Defendant. Citation. Filed in the District Court, Territory of Alaska, 4th Div. Jan. 28, 1915. Angus McBride, Clerk.

No. 2594. United States Circuit Court of Appeals for the Ninth Circuit. Citation on Appeal. Re-

ceived Mar. 18, 1915. F. D. Monckton, Clerk. Filed Apr. 1, 1915. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

[Title of Court and Cause.]

Order Extending Return Day [to May 1, 1915].

It having been stipulated and agreed by and between the parties hereto, through their respective attorneys, that the return day and the time for docketing the appeal in this action may be extended to and including the first day of May, 1915, on account of the great distance between Fairbanks, Alaska, and San Francisco, California, and the uncertainty of the mails.

NOW, THEREFORE, IT IS HEREBY ORDERED that the return day and the time for docketing said cause be extended to include the first day of May, 1915.

Dated at Fairbanks, Alaska, this 20th day of February, 1915.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 33.

[Endorsed]: No. 1894. In the District Court of the United States for the Territory of Alaska. F. G. Noyes, Receiver, etc., Plaintiff, vs. R. C. Wood, Defendant. Order Extending Return Day. Filed February 20, 1915. Angus McBride, Clerk. By P. R. Wagner, Deputy.

No. 2594. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to May 1, 1915 to File Record Thereof and to Docket Case. Filed Mar. 18, 1915. F. D. Monckton, Clerk. Refiled Apr. 1, 1915. F. D. Monckton, Clerk. .

No. 2594.

In the
United States Circuit Court of Appeals
For the Ninth Circuit.

**F. G. NOYES, as Receiver of WASHINGTON-ALASKA
BANK, a Corporation, - - - - - Appellant,**

V E R S U S

R. C. WOOD, - - - - - Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF ALASKA, FOURTH DIVISION.

B R I E F *of* A P P E L L A N T .

O. L. RIDER,
St. Louis, Mo.,
Attorney for Appellant.

Filed

MAY 1 - 1907

D. D. Mackinnon

In the
UNITED STATES CIRCUIT COURT OF APPEALS
For the Ninth Circuit.

No. 2594

**F. G. NOYES, as Receiver of WASHINGTON-ALASKA
 BANK, a Corporation, - - - - - Appellant,**
 V E R S U S
R. C. WOOD, - - - - - Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
 FOR THE TERRITORY OF ALASKA, FOURTH DIVISION.

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Trial was had to the court and Findings of Fact and Conclusions of Law were made and entered (Rec., pp. 68 to 84). Upon its Findings of Fact, the court found as a Conclusion of Law (Rec., p. 84): "That the plaintiff take nothing against the defendant, R. C. Wood, on the cause of action stated in the complaint, and that said action be dismissed." Afterwards Decree (Rec., pp. 85-87) was duly entered in accordance with said Conclusion of Law "that plaintiff take nothing against the defendant, R. C. Wood, by reason of his complaint herein, and that said action be and the same is hereby dismissed at the cost of plaintiff." (Rec., pp. 87-88.)

Plaintiff by Bill of Exceptions, duly settled and allowed (Rec., pp. 88-89), saved exceptions to said Conclusion of Law and to said Decree based thereon, on the ground as to each "that the same is contrary to the facts found by the court and contrary to law."

The case is here on plaintiff's appeal to test the accuracy of said Conclusion of Law and Decree upon the facts found by the court. Since there is no question here as to the correctness of the facts found, the only question being the correct application of the law thereto, the pleadings are not set out in this brief. Said Findings of Fact and Conclusions of Law fully and conveniently present the issues involved, and they are as follows (Rec., pp. 69-84):

I.

“ That the Washington-Alaska Bank, of which the plaintiff is receiver, was incorporated under the laws of the State of Nevada on the 21st day of January, 1908, with an authorized capital stock of \$300,000.00 divided into 3,000 shares of the par value of \$100.00 each; that said bank was incorporated under the name of the Fairbanks Banking Company; and that subsequently, by amendment to its Articles of Incorporation, said name was changed to Washington-Alaska Bank.

II.

“ That said bank commenced business in the town of Fairbanks, Alaska, on the 16th day of March, 1908, with a subscribed capital of \$206,000.00, part of which was paid for in cash, part in property, and the balance by the promissory notes of the subscribers.

III.

“ That prior to the 21st day of January, 1908, subscriptions for said capital stock were circulated, and the following persons among others, subscribed for shares thereof, to-wit. E. T. Barnette, 440 shares; R. C. Wood, 220 shares; James W. Hill, 220 shares; the name of R. C. Wood being subscribed thereto by said E. T. Barnette.

IV.

“ That prior to the incorporation of said bank, the said Barnette, Hill and Wood, as co-partners, were conducting a banking business in said town of Fairbanks under the firm name and style of Fairbanks Banking Company, which said company in December, 1907, owing

to financial difficulties, was unable to meet its obligations and was compelled to suspend business and close its doors, and was at the time of the organization of said corporation, conducting business upon a scrip basis, and the securities belonging to the firm were in the hands of trustees to secure such scrip.

V.

“ That said corporation was organized, among other things, for the purpose of taking over the business and affairs of said partnership and assuming the outstanding obligations.

VI.

“ That the capital of said partnership was \$200,000.00, which belonged to said Barnette, and the agreement existing between said partners was that the profits of said partnership were to be divided, one-half to said Barnette, and one-fourth each to said Hill and Wood.

VII.

“ That thereafter, and in the fore part of January, 1908, a large number of business, professional and mining men of the Fairbanks Recording District, Alaska, met in the town of Fairbanks, Alaska, for the purpose of organizing a corporation to purchase and take over and absorb the business of the Fairbanks Banking Company, a partnership, and at said meeting negotiations were begun by said proposed incorporators with said copartnership for the purchase of the same. That at said meeting a committee was appointed to go into the details of the reorganization of the Fairbanks Banking Company, and to report a basis upon which the

business should be taken over, two of the members of this committee having been members of the committee of depositors which had in December examined the assets.

VIII.

“ The said committee met on the 5th day of January, 1908, and, after investigating the affairs of the bank, made the following report to be presented for the consideration of the proposed new corporation :

“ (a) That the issued stock for the proposed new corporation be as of date February 15, 1908; that notes be taken for all deferred payments; that the same bear interest at the rate of one per cent per month from February 15, 1908, until paid; that twenty-five per centum of the unpaid for stock be due and payable on or before June 1st, 1908, and that the balance be due and payable on or before July 1st, 1908.

“ (b) That Captain E. T. Barnette and James W. Hill, with such associates as they may require, prepare a subscription list.

“ (c) That the amounts subscribed by any person be left to that person, and in case of over-subscription should be reduced proportionately.

“ (d) That the notes, properties and securities of the Fairbanks Banking Company, the old institution, examined by its present acting board of trustees and on which a valuation of \$288,000.00 in excess of its liabilities was placed, be accepted.

“ (e) That all notes, properties and securities which said board of trustees placed in the No. 3, or doubtful class remain the property of the old institution.

“ (f) That all interest on existing loans as of December 19, 1907, be computed to February 15, 1908, and that the amount of such accrued interest be placed to the credit of the old institution on the books of the new corporation, and that the same be payable on or before December 31, 1908.

“ (g) That should James W. Hill and R. C. Wood not take the full forty-four thousand dollars in stock in the new corporation, the balance of the amount not so taken to be paid to them not later than July 1st, 1908.

“ (h) That the proposition of Captain E. T. Barnette to leave on deposit with the new corporation the sum of two hundred thousand dollars, without interest for one year, be accepted, and that it be the understanding that such deposit will secure said new corporation against any adverse decision of the Court in the *Caus-tens v. Barnette* suit in so far as such decision may decrease the value of the Gold Bar Lumber Company property as accepted by the present board of trustees.

“ (i) That the officers of the new corporation be a president, vice-president, second vice-president, cashier, assistant cashier, treasurer, and secretary.

“ (j) That the number of the Board of Directors be twelve, four to be elected for six months, four for twelve months, and four for eighteen months or until their respective successors are duly elected and qualified.

“ (k) That dividends be declared semi-annually on June 30, and December 31.

IX.

“ That said report was, on January 6th, 1908, submitted to said proposed incorporators, and at said meeting the said report was read, and passed on section by section as read, and on motion duly made and carried was adopted and ordered kept as a part of the records of said meeting.

X.

“ That at said meeting a subscription list, a copy of which is set forth in paragraph 3 of the amended complaint in this cause, was presented and signed by said proposed incorporators, setting forth the amount for which each respectively subscribed.

XI.

“ That at said meeting it was also agreed on behalf of the Fairbanks Banking Company, a copartnership, that said partnership would turn over to said corporation the property of said Fairbanks Banking Company, a partnership, on the terms specified in said report, and said proposed incorporators in behalf of said proposed corporation, in consideration thereof, agreed to assume the liabilities of said partnership.

XII.

“ That said Fairbanks Banking Company, a corporation, became such on the 21st day of January, 1908. That on the 8th day of February, 1908, a meeting of the subscribers of the capital stock of the Fairbanks Banking Company was held for the purpose, among others, of obtaining notes of the subscribers for the stock subscribed by them, and, at said meeting, said stock notes were subscribed by said subscribers of stock and delivered to said corporation.

“ That at the time of said meeting the Articles of Incorporation of said Fairbanks Banking Company had not been received from the State of Nevada, and for the purpose of expediency it was deemed advisable to elect a Board of Directors, and twelve directors were elected at said meeting, and it was agreed that said Board of Directors should act as such until the arrival of the Articles of Incorporation, when a formal meeting would be held and proper by-laws be adopted.

XIII.

“ That said Articles of Incorporation did not arrive in Fairbanks until some time in the month of March, 1908, and immediately thereafter a meeting of the stockholders of the Fairbanks Banking Company, a corporation, was called, and at said meeting said stockholders, among other things, adopted by-laws and elected a Board of Directors; and also passed a resolution to the effect that the matter of taking over the property of the Fairbanks Banking Company, a partnership, be left to the Board of Directors.

“ That on the 12th day of March, 1908, at said meeting of the subscribers to said capital stock, said subscriptions were accepted by them and the above-named Barnette, Hill and Wood, together with the other subscribers, were declared to be stockholders of the said corporation. The defendant Wood was not present at said meeting, but he was notified of the result of the same by the said Hill.

XIV.

“ Subsequently, at a meeting of the stockholders of said corporation, it was resolved that

the matter of taking over the business and affairs of said partnership be left to the Board of Directors. Thereafter, on March 12, 1908, at a meeting of the Board of Directors, said matter was considered by them and the resolutions of the proposed stockholders, set out in Finding VIII hereof, were by said directors adopted and approved, except that the resolution providing for the payment of accrued interest up to February 15, 1908, was by them amended so as to read 'March 15, 1908.' At said meeting it was ordered by said Board of Directors that stock issue to said Barnette, Hill and Wood in exchange for the property received from them by said corporation, as follows: Barnette, 440 shares; Hill, 220 shares; Wood, 220 shares.

XV.

“ That on the 16th day of March, 1908, a written agreement was entered into between said corporation and said partners, and on the same day the same was signed by the said Barnette and Hill, and also on behalf of said bank by its president and secretary, wherein the valuation of the resources of said partnership was fixed at \$790,940.31 and its liabilities at \$538,940.31, leaving an excess of \$252,000.00 belonging to the said Barnette, Hill and Wood, in which said agreement the said Barnette, Hill and Wood agreed to accept stock of the corporation at its par value for the amount of assets in excess of said liabilities, except \$200,000.00 thereof should be placed to the credit of the said Barnette as a special deposit with said corporation upon the terms therein stated. By the terms of said agreement the amount of stock to be issued to Barnette, Hill and Wood was fixed at \$52,000.00 instead of \$88,000.00 as contemplated by

said resolution and subscription, thus entitling Barnette to 260 shares and Wood and Hill each to 130 shares. A copy of said agreement is annexed to plaintiff's complaint and marked 'Exhibit One.'

XVI.

" That at the time said agreement was entered into, the said Barnette was president of the said corporation and also a member of the Board of Directors; the said Hill was a member of its executive committee and also its vice-president, and the said Wood was its cashier. That said Barnette, Hill and Wood were also members of the partnership with which the said corporation contracted respecting the matters set forth in said agreement, and were each personally interested therein adverse to said corporation.

XVII.

" That the matter of preparing the papers for the transfer of said property belonging to said partnership to said corporation was, by the Board of Directors, left to the executive committee, and the said executive committee examined the affairs of said partnership, and, under their direction, said written agreement was prepared and afterward submitted to the Board of Directors for approval, and by them approved.

XVIII.

" That according to the by-laws of said corporation, the said executive committee had the same powers as the Board of Directors, subject to the approval of their acts by said Board of Directors.

XIX.

“ That at the time said written agreement was signed and executed, and during all of the negotiations leading up to the making of the same, the defendant Wood was in Seattle, Washington, but he was advised fully concerning the same by the said Hill by letter and by telegram.

XX.

“ That prior to the return of said Wood to Fairbanks, to-wit, on the 29th day of February, 1908, he offered to sell his stock in said corporation and to take in payment therefor part cash and a note for the balance, to be secured by said stock as collateral security.

XXI.

“ That the defendant Wood returned to Fairbanks, Alaska, some time in the month of April, 1908, and, upon his return, he signed said written agreement so entered into as aforesaid, knowing that the same contained said clause requiring him to take stock for his share of the assets of said partnership so transferred to said corporation in excess of the liabilities thereof as aforesaid, and also knowing that the same did not provide for the payment of said accrued interest, but with an oral understanding between himself and the officers of said bank that he might have, in accordance with said resolution, until July 1st, 1908, to elect either to take stock in said corporation or cash for his share of the assets of said partnership so transferred to said corporation.

XXII.

“ That of the loans and discounts transferred by said partnership to said corporation, a large

amount were then past due, of which then past due paper the sum of \$69,908.94 now remains in the hands of the receiver unpaid and uncollectible, which said loans and discounts were accepted by the directors of said corporation at their face value, and the same were included in those on which the accrued interest referred to in said resolution, was afterward computed.

XXIII.

“ That of said notes so past due as aforesaid, there were two executed by the Tanana Electric Company in the sum of \$27,997.38, which depended for their value upon the existence of an alleged guaranty of the Scandinavian-American Bank to make advancements sufficient to cover the same; that said alleged guaranty never had any existence in fact, and the claim therefor had been repudiated by said Scandinavian-American Bank prior to the time said note was accepted by said Board of Directors, and said repudiation was known to the members of said board. That said notes are still unpaid, and the same was at all times carried on the books of the said Washington - Alaska Bank, formerly Fairbanks Banking Company, as an asset in the sum of \$27,997.38.

XXIV.

“ That said Board of Directors and the officers of said bank accepted said notes of the Tanana Electric Company and paid therefor the sum of \$27,997.38.

XXV.

“ That among the other assets of said partnership so accepted by said officers and direct-

ors was four-fifths of the capital stock of the Gold Bar Lumber Company, a corporation existing in the State of Washington, which said stock was accepted and paid for at the valuation of \$341,949.00, and said stock was at all times during the existence of said corporation carried as an asset in said sum.

XXVI.

“ That at the first meeting of the Board of Directors, held on the 12th day of March, 1908, the defendant Wood was elected cashier of said bank, at which time he was then in the City of Seattle, Washington, as aforesaid. Immediate notice was given to him of said election.

XXVII.

“ That said Wood accepted said office of cashier while in the said City of Seattle, and, on the 16th day of March, 1908, entered upon the discharge of his duties as such cashier, and, upon his return to said Fairbanks in April, 1908, as aforesaid, entered actively upon such duties and continued to so act until June 29, 1908, when he tendered his resignation as such cashier, and the same was accepted by the Board of Directors to be effective at the close of business on June 30, 1908, and one B. R. Dusenbury, who was then assistant cashier, was elected to succeed Wood as cashier.

XXVIII.

“ That at the time said Wood tendered his resignation as cashier as aforesaid, he demanded that there be paid to him the amount of his interest in said partnership assets, to-wit, \$13,000.00.

XXIX.

“ That a certificate for 130 shares of the capital stock of said corporation had been written up in the name of the defendant Wood, of the par value of \$13,000.00, but the same was never detached from the stock book. That said 130 shares were carried on the books of said bank as outstanding stock from March 16, 1908, to June 30, 1908.

XXX.

“ That on the 30th day of June, 1908, with the knowledge, consent and approval of the officers and directors of said bank, a certificate of deposit was issued to and accepted by the said Wood in the sum of \$13,000.00, in lieu of said stock, which said certificate was signed by the said B. R. Dusenbury as assistant cashier prior to the time when the said resignation of the said Wood as cashier became effective, and said shares of capital stock were on the same day charged to treasury stock on the books of said bank.

XXXI.

“ That subsequently the said Wood drew out in cash from the funds of said bank the amount of the said certificate of deposit, to-wit, \$13,000.00.

XXXII.

“ That of the notes accepted from said partnership, as aforesaid, and paid for by said corporation, there were charged on December 31, 1907, by said partnership on the books of said partnership to an account known as ‘doubtful account’ the sum of \$22,979.99, and said doubtful account, so including said notes in said

amount, was then depreciated on the said books to the amount of thirty-three and one-third per cent thereof, which said notes were accepted by said corporation and paid for by them in the amount aforesaid, to-wit, \$22,979.99, all of which said notes were then past due, and of which there still remains unpaid and uncollectible the sum of \$12,860.61.

XXXIII.

“ That on March 23, 1908, pursuant to said resolution of the said Board of Directors adopted on March 12, 1908, the accrued interest on said notes so transferred to said corporation was computed to March 15, 1908, in the sum of \$39,642.81, and one-half thereof was placed to the credit of said Barnette, and one-fourth thereof each to the credit of said Hill and Wood on the books of said corporation, and subsequently the same was paid to the said Barnette, Hill and Wood in cash.

XXXIV.

“ That of said interest so paid to said Barnette, Hill and Wood as aforesaid, approximately \$7,500.00 thereof was never collected by said bank.

XXXV.

“ That at the time the said Wood so surrendered his stock as aforesaid, on June 30, 1908, the total assets of said corporation, as shown by its books were \$1,251,924.96 and its total liabilities were \$1,290,843.43 including its outstanding capital stock in the sum of \$201,600.00, including the \$13,000.00 of stock of the defendant Wood. That among said assets the capital stock of the Gold Bar Lumber Company was car-

ried at a valuation of \$341,949.00, and of its loans and discounts \$75,699.61 were then past due and are still unpaid, of which amount \$69,908.94 were taken over from said partnership, included in which was the above - mentioned notes of the Tanana Electric Company in the sum of \$27,997.38.

XXXVI.

“ That at the time said partnership assets were transferred to said corporation as afore-said, said Gold Bar Lumber Company was closed down and remained so until the fall of 1908; that immediately prior to its closing down, it had been operated at a loss; that no dividends have ever been paid on the capital stock of said Gold Bar Lumber Company during the time the same was owned by said bank.

XXXVII.

“ That subdivisions 5 and 6 of Article XII of the by-laws of said corporation, adopted at the stockholders' meeting held March 12, 1908, provided that all issued and outstanding stock of the company that may be donated, to, or purchased by the company, or which shall revert by reason of failure to pay for the same, shall be treasury stock, and shall be held subject to the disposal of the action of the Board of Directors. Said stock shall neither vote nor participate in dividends while held by the company. The Board of Directors shall be given the first option to purchase for the corporation the stock of any stockholder, and shall be entitled to purchase the same provided said Board of Directors shall offer to pay to said stockholder the same amount as he might obtain from any other person.

XXXVIII.

“ That the laws of the State of Nevada, under which said corporation was organized, provide that it shall not be lawful for the directors of a corporation organized thereunder to divide, withdraw or in any way pay to the stockholders any part of the capital stock of the company. Said laws further provide that a corporation may purchase its own stock in the manner provided therein, and that if the capital be decreased not in the manner provided by said laws the stockholders shall be liable for such sums as they may receive of the amount so reduced. None of the things required to be done in the matter of the purchase of stock by said corporation, or to reduce the capital thereof, were done in the surrender and purchase of the stock of the said Wood.

XXXIX.

“ That on said June 30, 1908, the said Fairbanks Banking Company had no surplus nor undivided profits with which to purchase the stock of the said Wood and the same was paid for out of its capital.

XL.

“ That the taking back of said stock and the payment therefor as aforesaid was illegal, wrongful, and in violation of the laws of the State of Nevada under which said corporation was organized.

XLI.

“ That pursuant to the agreement heretofore referred to between the said Fairbanks Banking Company and the said partnership formerly existing between the said Barnette, Hill and Wood,

the said sum of \$200,000.00 to be paid to the said Barnette was placed to his credit on the books of said corporation as a special deposit, and subsequently the entire sum thereof was paid to the said Barnette in cash and drawn out by him from the funds of said bank.

XLII.

“ That the assets of the said bank now in the hands of the receiver are insufficient to pay its liabilities, and the amount of such liabilities is more than \$470,000.00 in excess of the value of said assets.

“ CONCLUSIONS OF LAW.

“ Upon the foregoing Findings of Facts the Court finds as Conclusions of Law as follows:

“ That the plaintiff take nothing against the defendant R. C. Wood on the cause of action stated in the complaint, and that said action be dismissed.”

Upon the foregoing facts the court found that plaintiff was not entitled to recover and entered Decree dismissing plaintiff's action, which Decree is as follows:

“ DECREE.

“ *Be It Remembered* that on the 8th day of June, A. D. 1914, the above-entitled cause came on regularly for trial before the Court without a jury upon the issues as joined between the plaintiff and the defendant; the Honorable F. E. FULLER, Judge of said court, presiding; the

plaintiff appearing in person and by his attorney, O. L. Rider, and the defendant appearing in person and by his attorneys, John L. McGinn and A. R. Heilig.

“ And thereupon the plaintiff and defendant in open court agreed to submit the issues herein for final determination upon the testimony aduced, the admissions of the parties contained in the pleadings herein, and upon the testimony, so far as the same is applicable to said issues, heretofore introduced and received by the Court in cause number 1756 entitled ‘*F. G. Noyes, Receiver of the Washington-Alaska Bank, a corporation, plaintiff, v. J. A. Jessen et al., defendants,*’ pending in said court.

“ And thereupon the Court, after hearing the arguments of respective counsel and upon consideration of said pleadings and of said testimony, and being fully advised in the premises, did, on the 6th day of July, 1914, make and file his findings of fact and conclusions of law upon the issues herein;

“ And thereupon, upon consideration thereof, it is by the Court ordered, adjudged and decreed that the plaintiff take nothing against the defendant, R. C. Wood, by reason of his complaint herein, and that said action be and the same is hereby dismissed at the cost of the plaintiff.

“ All of which is now finally ordered, adjudged and decreed, this 6th day of July, 1914.

“

F. E. FULLER,

Judge of the District Court, Territory of Alaska, Fourth Division.”

The case is here to review this action of the lower court, with the prayer that the decree be reversed and proper decree entered in this court granting to plaintiff the relief sought.

The following stand out boldly from the foregoing Findings of Fact:

1. Wood was a subscriber to the capital stock of the corporation.
2. He afterwards became a stockholder and officer of said corporation.
3. While such stockholder and officer he sold his stock to the corporation and received therefor \$13,000.00.
4. At the time such sale was made, the liabilities of the corporation exceeded its assets as shown by its books \$38,918.47, and said stock was paid for out of the capital of said corporation.
5. Said purchase was made in violation of the laws of Nevada, under which it was incorporated, and was illegal and wrongful.
6. Wood never paid for the stock, and the payment to him of \$13,000.00 upon its surrender was without consideration, and fraudulent.
7. The oral understanding modifying the terms of the contract of March 16, 1908, is void.

SPECIFICATION of ERRORS.

The trial court erred in the following particulars:

I.

In making and entering the following Conclusion of Law (Rec., p. 87, Ex. 1) :

“ That the plaintiff take nothing against the defendant, R. C. Wood, on the cause of action stated in the complaint, and that said action be dismissed.”

II.

In making and entering a Decree herein that the plaintiff take nothing against the defendant, R. C. Wood, by reason of his complaint and that said action be dismissed at the cost of the plaintiff (Rec., p. 88, Ex. 2).

The questions presented by the foregoing Specification of Errors will be discussed under the following heads:

1. The secret oral understanding was void.
2. Is Wood liable to the Receiver for the amount received for the surrender of his stock?

- (a) Could Fairbanks Banking Company purchase its own stock, especially out of its capital?
- (b) If it could not, can the Receiver now recover the purchase money.

3. No consideration was received by the bank for this \$13,000.00. It is a part of the assets of the bank which were fraudulently given away. The Receiver can now recover it as a trust fund.

ARGUMENT.

I.

The Secret Oral Understanding Was Void.

There are two instruments which may be considered as the subscription of the defendant, Wood. *First*, the subscription proper; and, *second*, the written agreement of March 16, 1908. By the subscription proper, Wood, through his partner, Barnette, signed the same paper that all other subscribers signed. This was an unqualified agreement to take the designated number of shares set opposite the subscriber's name. It was presented to the subscribers at a meeting held on March 12, 1908, by them accepted, and Wood by them declared to be a stockholder. His other partner, Hill, kept him fully advised by letter and telegraph of all proceedings concerning the re-organization (F. 19). He must, therefore, have been advised of this subscription and its acceptance. This subscription was made "prior to the 21st day of January, 1908." Wood must have regarded these proceedings as fixing his status as a stockholder, because a month later, on February 29, 1908, he offered to sell his stock taking part cash and the balance to be secured by the stock as collateral (F. 20). Subsequently a certificate for 130 shares of stock was written up in his name and the same was carried on the books of the corporation as outstanding stock during all the time Wood was cashier. This

all occurred approximately two months prior to the alleged oral understanding by which he now seeks to avoid the subscription. Having become a subscriber and then a stockholder in the foregoing manner, he was powerless to change the situation by a subsequent parol agreement with the officers of the bank. The parol agreement made two months later with such officers could not become a condition to the original accepted written subscription, without the consent of the other stockholders, at least.

“ When a corporation is organized, and a subscription to its stock previously made is accepted, such subscription becomes a contract binding according to its terms, the parties to which are the corporation on one side and the subscriber on the other.”

—*McNaught v. Fisher*, 96 Fed. 168, 37 C. C. A. 438.

“ The directors of a corporation have no power to cancel any part of a subscription to the capital stock without the consent of the other stockholders.”

—*Gathright v. Oil City Land & Improvement Co.*, (Ky.) 56 S. W. 163;

Chicago B. & M. Co. v. Lyon, (Okla.) 69 Pac. 6.

Then, again, this subscription is restated when the written agreement of March 16, 1908, is entered into. It, by its express terms, bound Wood to take stock in the corporation for his share in the partner-

ship assets. Wood signed it on his return to Fairbanks in April, 1908, and, *when he signed it, he knew that it contained the clause requiring him to take said stock.* The “oral understanding” was not omitted through any fraud, accident or mistake. But he now says that clause in the contract must give way to the contemporaneous oral understanding had between himself and the officers of said bank, that he might have until July 1, 1908, to elect to take said stock or cash. Such option is void. It is a fraud upon the creditors, the other stockholders and upon the bank. The receipt of testimony to prove it violates a well known rule of evidence.

In Zane on Banks and Banking, Sec. 59, pages 94-95, it is said:

“ The engagement which a stockholder makes when subscribing for stock is to pay the amount of his stock subscription. This engagement is a contract with the corporation which becomes binding as soon as the corporation is formed. This capital fund must be paid to the corporation. * * * The contract may be avoided, it is true, on the ground of fraud if the subscriber is not estopped from making that defense. But conceding a valid subscription, the subscribed capital becomes the security of the creditors, and the stockholders are powerless to make any arrangement among themselves relieving them from this liability. Nor can the capital stock be divided up among the stockholders to the prejudice of the creditors of the corporation.”

In *Topeka Mfg. Co. v. Hale*, (Kan.) 17 Pac. 601, it is said:

“ A parol agreement made at the time of subscribing for stock, and inconsistent with the written terms of a subscription, is immaterial, incompetent and void.”

In Cook on Corporations (6th ed.) at section 81, it is said:

“ Under the general rule of evidence that a written agreement cannot be varied or added to by parol evidence, it is not competent for a subscriber to stock to allege that he is but a conditional subscriber. *The condition must be inserted in the writing in order to be effectual.*”

Again at section 137, the same author says:

“ Where a subscription contract is absolute on its face, it is well settled, both in equity and at law, that parol evidence of previous or contemporaneous negotiations, stipulations, terms, or agreements is not admissible to vary or add to the contract, except for the purpose of proving that the parties, at the time of consummating the agreement, intended and understood that such terms and stipulations would be incorporated in the contract, but omitted the same by accident, fraud or mistake. This rule, forbidding the introduction of parol evidence to explain, contradict or vary a written instrument, applies to a subscription contract for stock in a corporation. *Neither party is permitted to prove a different contract from that expressed in the written instrument. Under the rule, not*

even a separate written contemporaneous contract is admissible to change the subscription contract."

Again at section 170, he says:

" A cancellation of a subscription, to the detriment of corporate creditors, may be impeached by the latter and set aside. Especially is this the rule when the cancellation is made after the corporation has become insolvent."

Again at section 191, he says:

" In fact, *secret agreements to release are void*, and subscribers receiving them are liable on their subscriptions absolutely, as though no special advantages had been promised."

In *Putnam v. N. A. & S. C. J. R. R. Co.*, (U. S.) 21 L. ed. 361, 363 (reported in 16 Wall. 390 under title *Burke v. Smith*), the Supreme Court of the United States says:

" And it is clear that the directors of a company, organized under the law, have no power to destroy it, to give away its funds, or deprive it of any means which it possesses to accomplish the purposes for which it was incorporated. The stock subscribed is the capital of the company, its means for performing its duty to the commonwealth, and those who deal with it. Accordingly, it has been settled by very numerous decisions that *the directors of a company are incompetent to release an original subscriber to its capital stock, or to make any arrangement with him by which the company, its creditors, or the*

*state shall lose any of the benefit of his subscription. Every such an arrangement is regarded in equity, not merely as ultra vires, but as a fraud upon the other stockholders, upon the public and upon the creditors of the company. * * **

“ * * * Conditions attached to subscriptions, which, if valid, lessen the capital of the company, thus depriving the state of the security that the railroad would be built, and diminishing the means intended for the protection of creditors, are, therefore, a fraud upon the grantor of the franchise and upon those who may become creditors of the corporation. *They are also a fraud upon unconditional stockholders, who subscribed to the stock in the faith that capital sufficient would be obtained to complete the projected work, and who may be compelled to pay their subscriptions, though the enterprise has failed, and their whole investment has been lost. It is for these reasons that such conditions are denied any effect.*”

In *Morgan v. Struthers*, 131 U. S. 246, 33 L. ed. 132, 135, Mr. Justice LAMAR, speaking for the court, referred to the principle herein contended for as

“a doctrine settled in a great number and variety of decisions, that a corporation has no legal capacity to release an original subscriber to its capital stock from the payment of it, in whole or in part; and that any arrangement with him by which the company, its creditors, or stockholders, shall lose any part of that subscription, is *ultra vires* and a fraud upon creditors and the co-subscribers (citing cases). This doctrine rests upon the principle that the stock subscribed, both paid and unpaid, is the capital of

the company, and its means of carrying out the object for which it was chartered and organized.”

In *Sawyer v. Hoag*, 17 Wall. 610, 21 L. ed. 731, the principle is declared that no agreement, device or artifice between the corporation and its stockholders, the effect of which is to deprive the creditors of the benefit of this trust fund or any portion of it, is valid against creditors.

The Fairbanks Banking Company, afterwards known as Washington-Alaska Bank, for which plaintiff sues herein as Receiver, was organized under the laws of the State of Nevada. If by the laws of the State of Nevada, such oral agreements are void, then Wood is bound by such law.

—*Giesen v. London etc. Mtg. Co.*, 102 Fed. 584, 42 C. C. A. 515.

Relfe v. Rundle, 103 U. S. 222, 226, 26 L. ed. 337;

Silver Mines v. Brown, 58 Fed. 644, 7 C. C. A. 412;

Railway Co. v. Gebhard, 109 U. S. 527.

In *Giesen v. London etc. Mtg. Co.*, *supra*, the court said:

“ When a person subscribes for stock in either a domestic or a foreign corporation, *he thereby consents to be governed by the provisions of its charter or the general law under which it is incorporated*, and by such by-laws as the corporation may lawfully enact, *and that his rights and liabilities as a stockholder shall be tested and determined by such laws.*”

In construing the provisions of the constitution and statutes of another state, the decisions of the Supreme Court of that state are controlling.

—*Fairfield v. County of Gallatin*, 100 U. S. 50;

Fowler v. Lamson, (Ill.) 34 N. E. 932, 933.

In the case of *Thompson v. Reno Savings Bank*, 7 Pac. 68, the Nevada court held:

“ The decisions uniformly hold that any secret arrangement between the corporation and its stockholders by which the responsibility of the latter is made less than it appears to be under the articles of incorporation is void as against creditors.”

In the case last cited, the capital stock was represented to be \$100,000.00, but there was a secret agreement that only thirty per cent need be paid in. Suit was brought for the remaining seventy per cent due on the stock and this agreement was interposed as a defense, and the principle above quoted was declared to be the law of Nevada. It ought not to be necessary to cite any further authority on this proposition in view of the rule in *Geisen v. Mtg. Co.*, *supra*, and *Fairfield v. County of Gallatin*, *supra*.

But the principle has also been announced in the Supreme Court of the United States. In *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203, it is held:

“ A contract between a company or its agents and the stockholders, limiting their liability as

to unpaid installments of stock is void as to creditors of the company, and as to the rights of the assignee who represents the creditors.”

Again in *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220, the same court held:

“ A resolution or agreement by the directors that no further call shall be made, is void as to creditors. The capital stock of an incorporated company is a fund set apart for the payment of its debts, and it cannot be diverted from such purpose.”

In *Thompson v. Reno Savings Bank*, *supra*, the Nevada court defined the term “capital stock” to be “the amount of money paid or promised to be paid for the purposes of the corporation.”

In *Scorille et al. v. Thayer*, 105 U. S. 143, 26 L. ed. 969, certificates of stock by agreement between the corporation and its stockholders, were issued as fully paid when in fact there had only been twenty per cent thereof actually paid. Plaintiffs as Assignees in Bankruptcy under order of court made an assessment and call upon the unpaid stock for the purpose of paying the debts of the corporation, and upon failure to pay the same, an action at law was brought against defendant. The court said (26 L. ed. 973) :

“ The stock held by the defendant in error was evidenced by certificates of full paid shares. It is conceded to have been the contract between

him and the company that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other shareholders, and the fact was known to all. As between them and the company this was a perfectly valid agreement. * * * But the doctrine of this court is, that such a contract, though binding on the company, is a fraud in law on its creditors, which they could set aside; that when their rights intervene, and to satisfy their claims, the stockholders could be required to pay their stock in full. *Sawyer v. Hoag*, 17 Wall. 610; *New Albany v. Purke*, 11 Wall. 96; *Burke v. Smith*, 16 Wall, 390.

“ The reason is, that the stock subscribed is considered in equity as a trust fund for the payment of creditors. (Citing cases.) It is so held out to the public, who have no means of knowing the private contracts made between the corporation and its stockholders. The creditor has, therefore, the right to presume that the stock subscribed has been or will be paid up, and if it is not, a Court of Equity will at his instance, require it to be paid.”

In *Olmstead v. Vance & Jones Co.*, 63 N. E. 634, the Illinois Supreme Court, said:

“ This court has repeatedly held that, as against the claims of creditors, it is immaterial what private arrangements subscribers may make with the corporation, and that any device by which the members of the corporation seek to avoid the liability imposed upon them by law is void as to creditors, whether binding or not as between themselves and the corporation. (Citing cases.) If such an arrangement as that made

between the Smith & Jones Company and Bentley & Olmstead could be enforced, a corporation might then, at the time of its organization, make such a contract with each of its stockholders as to totally destroy the capital stock of the concern, and deprive the creditors of all security from this trust fund. The capital stock is a trust fund furnished for the benefit of the creditors of the corporation, and equity will not permit it to be destroyed or impaired to their injury for the benefit of stockholders. The creditors of this corporation had a right to rely upon the application of the capital stock toward the payment of their claims; and to permit this plaintiff in error to cancel his stock upon this inequitable agreement, and to receive a premium of ten per cent, in addition, would be a violent disregard of a long line of decisions of this court."

If exception be taken to the Illinois decisions because of the trust fund theory alluded to in the above quotation, reference is again made to the Nevada case of *Thompson v. Reno Savings Bank*, *supra*, wherein it is held that "*The capital stock*, and especially the unpaid subscriptions thereto, *is a trust fund* for the benefit of the general creditors." Thus putting Nevada in line with those jurisdictions declaring the capital stock of a corporation to be a trust fund, and by that rule the incorporators of the Fairbanks Banking Company are bound.

In *Barto v. Nix*, (Wash.) 46 Pac. 1033, it is held (3 syl.) :

" In an action by a receiver of an insolvent bank against the directors to recover the par

value of stock held by them, which had not been paid for, the defendants can not set up in defense a secret agreement with the bank that they should not pay for the stock, nor incur any liability by reason of its issuance to them, but should hold it for the benefit of the corporation."

I do not think it necessary to comment at length upon the decisions outside of the Nevada and Federal Courts upon this matter. They should be conclusive as to this point, and under them the oral understanding sought to be availed of is absolutely void, and Wood must be regarded as a stockholder and not as an optionee. If further authorities are desired, reference is respectfully made to the cases cited in the note to the sections of Cook on Corporations above quoted.

The Nevada decision above referred to was rendered in construction of the identical incorporation law under which the Fairbanks Banking Company was incorporated, and prior to its incorporation. Hence, in construing the provisions of the statutes of that state, the decisions of its Supreme Court are controlling.

—*Fairfield v. County of Gallatin*, 100 U. S. 50;

Fowler v. Lamson, (Ill.) 34 N. E. 932.

For another reason, the oral understanding is void. It was had between the defendant and the "officers of said bank." The officers of the bank were powerless to make such an agreement binding upon

the bank. The bank in such matters could only be bound by its Directors, acting together as a board, and the only action they ever took was to approve the written contract which obligates Wood to take the stock. (F. 17.)

Trustees of a corporation can only bind it when they are together as a board, acting as such.

—*Hillyer v. Overman, S. M. Co.*, 6 Nev. 51.

II.

Is Wood liable to the Receiver for the amount received for the surrender of his stock?

(a) Could Fairbanks Banking Company purchase its own stock, especially out of its capital?

(b) If it could not, can the Receiver now recover the purchase money?

The right of a corporation to purchase its own stock has been frequently before the courts, and they are divided on the question. Generally, however, where the right has been allowed, it was derived from statute; or, where not derived from statute, the offending corporation was acting within some exception to the rule prohibiting it, as where, for example, it was not prejudicial to the rights of creditors, or stockholders; or where the purchase was not made out of the capital, but out of surplus or undivided profits; or where it was necessary in order to be relieved of a stockholder whose association was injuri-

ous to the company; or to prevent the loss of a debt due the company. None of these grounds appear in the case at bar. The reason for denying to a corporation the right to re-purchase its own stock is generally grounded upon the principle, either that the capital is a trust fund upon which creditors have a prior claim over stockholders, or that creditors have a right to rely upon some added liability which attaches to one owning stock over and above the amount invested in such stock. In either event it is considered contrary to sound public policy to permit the stockholders to divide among themselves the fund to which creditors look for payment of their claims. Again, it is prejudicial to the other stockholders. It is highly inequitable to allow one stockholder without the consent of the others, to withdraw his share of the common venture in full, leaving the others to risk what they ventured in a joint enterprise. If the offending corporation has such right and exercised it to the full limit, all of its capital could be distributed to its stockholders, or certain favored ones, leaving to creditors and other stockholders, only its promises to pay. Of course the right to re-issue the stock would be existant, but what would that avail when its assets had been depleted or consumed? Stock which merely evidenced a liability to assessment would not avail creditors much in satisfying their claims.

In the case at bar none of the above noted exceptions to the rule exist, and we are dealing solely with the right of an insolvent corporation to repurchase its own stock. On June 30, 1908, when the transac-

tion complained of was had, the Fairbanks Banking Company had liabilities exceeding its assets in the amount of \$38,918.47, as shown by its books (F. 35). Included in those assets were the worthless notes of the Tanana Electric Company, aggregating \$27,997.38 (F. 23). Here was a corporation unquestionably insolvent to the extent of \$66,915.85, nearly one-third of its outstanding capital, without any consideration of its other past due and uncollectible paper or the Gold Bar Lumber Company stock. While in this condition, Wood withdrew \$13,000.00 of its capital in cash, by which act his interest as a stockholder was protected, but the rights of its creditors rendered further precarious. To put beyond controversy the matter that this corporation was insolvent and that the purchase was made out of its capital, reference is further made to Finding 39, which is as follows:

“ That on said June 30, 1908, the said Fairbanks Banking Company had no surplus nor undivided profits with which to purchase the stock of the said Wood and the same was paid for out of its capital.”

In his work on Corporations, section 311 (6th ed.), Mr. Cook, after alluding to the difference of opinion in the American courts as to the right of a corporation to repurchase its stock says (p. 849):

“ The objection usually made to allowing a corporation to purchase its own stock is that thereby the corporate funds are expended and no property is received by the corporation, ex-

cept the right to resell. This objection is merely a limit to the power of the corporation to purchase. In Illinois, the state where the right of the corporation to make such purchases is most clearly and decisively established, the collateral principle that such purchases are to be declared illegal and voidable at the instance of corporate creditors who are injured thereby is distinctly stated and rigidly applied. *If the corporation is insolvent at the time of the purchase, it is clearly an invalid transaction, and will be set aside. The rule goes still further, and declares that if a corporation, by a purchase of shares of its own capital stock, thereby reduces its actual assets below its capital stock and debts, or if the actual assets at that time are less than the capital stock and debts, such purchase may be set aside, and the guilty corporate officers, as well as the vendor of the stock, may be rendered liable thereon at the instance of a corporate creditor."*

In Thompson on Corporations, section 1548, it is said:

" For a corporation to repurchase its shares at a price which the subscriber has paid for them is simply to distribute the trust fund of creditors, hereafter spoken of, among those from whom it was originally collected. *That this can not be done as against creditors, if it has any, is plain. That it can not be done as against shareholders is equally plain.* In the absence of special circumstances, such as rendering allowable compromises, it is safe to say that this can not be done as against other shareholders, in the absence of statutory authorization, without unan-

imous consent. For this reason, *the general rule is that a corporation can not purchase and hold its own shares.*”

Again at section 2054, the same author says:

“ The capital stock of a corporation being a trust fund for creditors, *the general rule, in the absence of an enabling statute, is, that a corporation cannot employ its funds in purchasing its own shares*, thus distributing its capital among its shareholders to the manifest detriment of its creditors. As was observed by Lord HERSCHEL, L. C.: ‘Stringent precautions to prevent the reduction of the capital of a limited company without due notice and judicial sanction, would be idle if the company might purchase its own shares wholesale.’ and if it were otherwise, the result would be that the shareholders would receive back the money subscribed, and t h e r e would thus pass into their pockets what before existed in the form of cash in the coffers of the company, or of buildings, machinery, or stocks available to meet the demands of the creditors. And he also held that the purchase of shares for the purpose of reselling would be a trafficking or dealing in shares and unlawful. The rule which forbids a corporation thus to employ its funds rises to the grade of a rule of public policy; and is so strong that, although power is conferred upon the company to deal in the shares of joint-stock companies generally, this does not authorize it to deal in its own shares. It is immaterial whether the transfer is made to the company itself, or to a nominee of the directors to hold in trust for the company: in the latter case, equally with the former, it is invalid.”

In Morawetz on the Law of Private Corporations, section 112, it is said:

“ A purchase by a corporation of shares of its own stock in effect amounts to a withdrawal of the shareholder whose shares are purchased from membership and a repayment of his proportionate share of the company's assets. There is no substitution of membership under these circumstances as in case of a purchase and transfer of shares of a third person, but the members of the company and the amount of its capital are actually diminished. Whatever a transaction of this character may be called in legal phraseology, it is clear that it really involves an alteration of the company's constitution, just as the withdrawal of a member of a co-partnership with his proportionate share of the joint funds involves an alteration of the constitution of a co-partnership. The amount of the company's assets and the number of its shareholders are diminished. Every continuing shareholder is injured by the reduction of the fund contributed for the common venture; and the creditors who have trusted the company upon the security of the capital originally subscribed, or who are entitled to expect that amount of security, are entitled to complain.

“ It is no answer to say that shares having a market value must be regarded like any other personal property, and that no person is injured if a solvent corporation in good faith purchases shares in itself at their market value, inasmuch as the shares so purchased are property in the hands of the company and may at any time be re-issued or sold. *No verbiage can disguise the fact that a purchase by a corporation of shares*

of itself really amounts to a reduction of the company's assets and that the shares purchased in fact remain extinguished, at least until the re-issue has taken place. The fact that such a transaction may not necessarily be injurious to any person is not a sufficient reason for supporting it. It is contrary to the fundamental principle of the stockholders and is condemned by the plainest dictates of sound policy. To allow the directors to exercise such a power would be a fruitful source of unfairness, mismanagement and corruption. It is for these reasons that a shareholder can not be allowed to withdraw from the corporation with his proportionate amount of capital either by a release and cancellation before the shares have been paid up or by a purchase of the shares with the company's funds."

The court found (F. 38) the provisions of the Nevada law, under which Fairbanks Banking Company was organized, respecting the repurchase by a corporation of its own stock to be as follows:

" That the laws of the State of Nevada, under which said corporation was organized, provide that it shall not be lawful for the directors of a corporation organized thereunder to d i v i d e , withdraw or in any way pay to the stockholders any part of the capital stock of the company. Said laws further provide that a corporation may purchase its own stock in the manner provided therein, and t h a t if the capital be decreased not in the manner provided by said laws the stockholders shall be liable for such sums as they may receive of the amount so reduced. None of the things required to be done in the matter of the purchase of stock by said corporation, or to

reduce the capital thereof, were done in the surrender and purchase of the stock of the said Wood."

From the foregoing, it is clear that the corporation is forbidden to divide, withdraw or in any way pay to the stockholders *any part of the capital stock*. The stockholders must keep their hands off of it. The court found (F. 39) that the Wood stock was paid for out of the capital of the bank. Such corporations are by said law, however, permitted to purchase their own stock or reduce the amount thereof, by pursuing the course provided by the laws of that state, none of which things were done in the surrender and purchase of the Wood stock, and the court accordingly finds (F. 40) that the taking back of said stock and payment therefor was "illegal and wrongful and in violation of the laws of the State of Nevada." The penalty provided in the law for such a transaction is "that the stockholders shall be liable for such sums as they may receive of the amount so reduced" (F. 38).

As in the matter of the effect of the oral understanding, by which the written agreement of March 16, 1908, was attempted to be conditioned, the Nevada court has also spoken upon the violation of the statutes of that state, which is alluded to in the court's finding, *supra*. I again refer to *Thompson v. Reno Savings Bank*, 7 Pac. 68.

In the case last cited, the articles of incorporation fixed the capital of the bank at \$100,000.00, but it was agreed between the stockholders that only thir-

ty per cent of the stock need be paid in. One Lake was a stockholder and upon the failure of the bank, suit was brought against him by the receiver for the remaining seventy per cent due on his stock. He interposed this agreement as a defense. The court, after holding that the capital stock of a corporation organized under the laws of the state for the purpose of banking is the amount paid or promised to be paid for the purposes of the incorporation, and it is a "fixed sum, not to be increased or diminished, except in the mode permitted by the statute," characterizes such an arrangement as one "made in defiance of the statute under which it was incorporated," and then quotes section 3543 of the Compiled Laws, as follows:

" It shall not be lawful for the directors to divide, withdraw or in any way pay to the stockholders or any of them, any part of the capital stock, nor to reduce the amount of the same."

In the *Thompson* case, there was a surrender to the stockholder of a part of the capital stock "promised to be paid," which was condemned, and for which recovery by the Receivers was had. In the case at bar, the Receiver is following and seeking to recover that part of the actual active capital—the very corpus of the bank—which was divided, withdrawn and paid over to a stockholder. In the *Thompson* case, "the mode permitted by the statute" was not followed, and penalty of the statute was visited upon Lake. Neither was it followed in Wood's case

(F. 38), and he likewise should be compelled to repay the amount which he received, as the statute provides. In the opinion in the *Thompson* case, the Nevada court sets out the statutory provisions for any change in the amount of the capital, and then says:

“ The publicity required in this proceeding is for this purpose—in part at least—of advising the public dealing with the corporation of the proposed change. The requirement of the statute—*first*, that the publicly recorded certificate of incorporation shall state the amount of the capital; and, *second*, that any change in the amount thereof shall only be made after extended public notice—is in direct conflict with the secret contrivance alleged to have been made by Lake and his associates.”

Under the rule in *Fairfield v. County of Gallatin*, *supra*, and in *Giesen v. London etc. Mtg. Co.*, *supra*, the decision of the Nevada court in the *Thompson* case is binding upon this defendant and ought to settle every phase of this litigation in favor of the Receiver herein.

The fact that the by-laws of the Fairbanks Banking Company may have contemplated the purchase of its stock by the bank (F. 37) is no defense to the acts complained of. Being in conflict with the law of Nevada, such provision is void.

—*State ex rel Corey v. Curtis*, 9 Nev. 325;
Herring v. Ruskin Co-op. Ass'n, (Tenn.)
52 S. W. 327;
Vercoutre v. Golden State Land Co., (Cal.)
48 Pac. 375.

The National Bank Act forbids a national bank to purchase any of its shares unless the purchase shall be necessary to prevent loss upon a debt previously contracted. Violations of this act have on several occasions brought the statute before the federal courts for construction, but most generally in cases w h e r e a stockholder subsequently purchasing the stock from the bank resisted an assessment upon the ground that the stock was void. In such cases, the court, while declaring the sale of the stock to the bank to be illegal, declined to hold the stock to be void. The distinction is readily apparent between the illegal act of the bank in purchasing and the validity of the stock itself. The stock being valid, such subsequent transferee takes good title to it; but in such case no title passed to the bank.

In the case of *Burrows v. Niblack*, 28 C. C. A. 130, 132-3, Burrows sold his stock in Chemical National Bank to said bank in violation of the National Bank Act. The receiver sued to recover the amount paid him for the same. The lower court found that the sale was "illegal, null and void, and the plaintiff, consequently, entitled to recover of the defendant the sum paid, with interest," and this judgment was affirmed by the Circuit Court of Appeals for the Seventh Circuit. In the opinion, the court said:

" The transaction here in question is not a purchase made for the purpose of preventing, or which was necessary to prevent, loss upon a debt previously contracted, but, as set forth, it was a

bald purchase by the bank of its own stock for cash, and necessarily involved for the time being a reduction *pro tanto* of the corporate stock. *Even if it were not forbidden by the statute, the transaction would be inconsistent with public policy and with established principles of law.*

* * * *The purchase was outside of and beyond the powers of the bank, and, therefore, as a corporate act, was void from the beginning; and, while it appears from the agreement that the certificates of stock were endorsed in blank and delivered to the president of the bank, the latter did not thereby acquire, nor the plaintiff in error part with, title to the stock. The money having been unlawfully paid out, the bank had an immediate right of action to recover it in an action of assumpsit. It was not necessary to go into equity, nor to offer a return of the stock."*

In *Johnson v. Laflin*, 13 Fed. Cases 764, Laflin, a stockholder in a National Bank, sold his stock to one Britten, president of the bank. The sale was made through a broker who gave his personal check to Laflin for the purchase price. It subsequently developed that Britten had paid the broker for the stock with the money of the bank, but without the knowledge of Laflin. A bill in equity was filed to have Laflin declared to be still a stockholder of the bank; to have Britten ordered to re-transfer the shares to Laflin on the books of the bank; and for a money judgment against Laflin for the amount he received. The court held that inasmuch as Laflin was ignorant of the fact that the money paid him was the money of the bank no recovery could be had. The opinion

was rendered by Judge DILLON, one of the ablest corporation lawyers who ever sat on a United States bench, and in the course of the opinion, he added the following *dictum*:

“ Inasmuch as this act, ‘The National Bank Act,’ in express terms prohibits a national bank from thus becoming the purchaser of the shares of its own capital stock, if Laflin had made a contract to sell his shares to the bank, or to its president for the bank, it is plain that such a contract would have been *ultra vires* and illegal, both as respects creditors and other stockholders, and the transaction could have been impeached by the bank in its corporate capacity, or by its other shareholders, even if it were still solvent and going on, or by the receiver as the officer appointed to wind up its affairs. *In re London, etc., Exchange Bank*, 5 Ch. App. 444-452; *Great Eastern Railway Co. v. Turner*, 8 Ch. App. 149; *Currier v. Lebanon Slate Co.*, 56 N. H. 262. And although Laflin did not contract to sell his shares direct to the bank, or to the president for the bank, still *if before the transaction was completed he had notice, actual or constructive, that the purchase was, in fact, a purchase for the bank, and paid for by the money of the bank, the transaction can not stand, and the receiver may compel him to pay back the money thus received and have him declared still to be a stockholder.*

“ It would be easy to support this proposition by argument and by the authority of adjudged cases, but they are so plain that it is not necessary to do so.”

There can be no question but that Wood knew the purchase was for the bank and paid for by the money of the bank. There is no attempt to claim that it was otherwise. Indeed, the transaction is justified under the so-called oral understanding. The purchase was clearly illegal—in defiance of the laws of Nevada. How, then, can it stand? Why may not the Receiver compel him to pay back the money thus received?

The case last cited was appealed to the Supreme Court (*Johnson v. Laflin*, 103 U. S. 800, 26 L. ed. 532) and was affirmed in an opinion by Justice FIELD, who added thereto this observation :

“ Of course, the whole case here would be changed if the sale by Laflin had not been made in good faith, but was made merely to evade his just responsibility as a stockholder, or to work a fraud upon other stockholders or creditors of the bank.”

In *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203, the Receiver of an insurance company was permitted to recover of stockholders unpaid installments of stock, which had been released under an agreement between the company and its stockholders. The court said :

“ The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the

benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts. The idea that the capital of a corporation is a football to be thrown into the market for the purposes of speculation, that its value may be elevated or depressed to advance the interests of its managers, is a modern and wicked invention. *Equally unsound is the opinion, that the obligation of a subscriber to pay his subscription may be released or surrendered to him by the trustees of the company. This has been often attempted, but never successfully. The capital paid in, and promised to be paid in, is a fund which the trustees cannot squander or give away. They are bound to call in what is unpaid and carefully to husband it when received.*"

In the case last cited, the Receiver was following and recovering "capital promised to be paid in"; but the decision says that capital paid in as well as that promised to be paid in can not be squandered or given away by the directors.

In *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220, the court said:

" The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private co-partnerships.

" When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors

have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation, for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no distinction between such a demand and any other assets which may form a part of the property and effects of the corporation.”

In *Bundy v. Jackson*, 24 Fed. 628, the Hot Springs National Bank owned \$500.00 of its own stock which was carried on its books as \$550.00 cash. The president and cashier signed the name of a fictitious person to a promissory note, payable to their order for \$550.00, which they endorsed to the bank and took up this stock and had the same transferred to themselves on the books of the bank. About the time the bank closed its doors, they transferred the stock back to the bank and destroyed the note. The Receiver brought suit on the note. Judge CALDWELL, in rendering judgment for the amount of the note and interest, said:

“ The subsequent effort of Bruon and the defendant to relieve themselves from liability, by transferring the stock back to the bank and tear-

ing up their note, was futile. The statute declares the bank shall not purchase its own stock, unless such purchase shall be necessary to prevent loss upon a debt previously contracted. The purchase by the bank, through its president, of the stock owned by himself and the defendant was not made to prevent such a loss. The president of the bank had no power to purchase stock from strangers, or release the claims of the bank against any person. *Morse, Bank, 146, 147.* And, of course, he could not act in the double capacity of buyer and seller, and contract with himself for the discharge of his own obligation, and, as president of the bank, purchase stock from himself, which the bank by law was prohibited from purchasing from any one. *For this act there could be no authorization in advance, and no ratification afterwards. It does not have to be formally disaffirmed by the directors or the receiver, because neither could ratify or impart validity to it if they desired to do so. The sale of the stock by the bank was enjoined upon it by law, and its sale by the president could therefore be ratified, however irregular it may have been in the first instance; but the purchase of the stock by the bank was interdicted by law, and was therefore incapable of ratification. The assets of the bank constitute a trust fund for the benefit of its creditors, and when wrongfully diverted can be followed in whosoever hands they can be traced. The debt incurred by the defendant to the bank, by the purchase of the stock and the execution of the note, has never been paid. The destruction of the evidence of the debt did not pay the debt. The title to the stock never passed from Bruon and the defendant to the bank. The stock is theirs, and if in the possession of the bank, or the receiver, it is held in*

trust for them. If the acts practiced by the president and cashier of the bank in this case can be indulged in with impunity by bank officers, then the safeguards provided by statute for the security of depositors and other creditors of the bank are blank paper.”

In *Wood v. Dumner*, 30 Fed. Cases 435, No. 17944, an incorporated bank, before the expiration of its charter, divided three-fourths of its capital stock among the stockholders without providing funds sufficient to pay its outstanding notes. Mr. Justice STORY, delivering the opinion, held that the capital stock was a trust fund for the payment of the bank's debts and might be followed into the hands of the stockholders. This case is cited with approval in *Scoville v. Thayer*, 105 U. S. 143, 26 L. ed. 968, 973.

In *Hamor v. Taylor, Rice Eng. Co.*, 84 Fed. 187, one Willard sold his stock to the corporation and received therefor its promissory note. After appointment of receiver, he presented his claim for allowance based upon said note. It was held (Syl. 4 and 5):

“ In the absence of statutory authority in that behalf, a corporation, whether solvent or insolvent, has no legal power to reduce the fund represented by its capital stock by any formal or voluntary act on its part, to the prejudice of its creditors *then or thereafter existing*, by distributing any part of it among the stockholders by way of dividend, or by giving any part of it to one or more stockholders, or by disposing of

- any part of it in any manner, except by way of changing its form to meet the exigencies of the corporate business.

“ It is ultra vires of a corporation to dispose of any part of its property, other than surplus or net profits, for the purchase of shares of its own stock, and a promissory note given by the corporation for that purpose is a nullity.”

In *Farrington v. Tennessee*, 95 U. S. 679, 686, the court said:

“ The capital stock is the money paid or authorized or required to be paid in as the basis of the business of the bank, and the means of conducting its operations. It represents whatever it may be invested in. If a large surplus be accumulated and laid by, that does not become a part of it. The amount authorized can not be increased without proper legal authority. If there be losses which impair it, there can be no formal reduction without the like sanction. No power to increase or diminish it belongs inherently to the corporation. It is a trust fund, held by the corporation as a trustee.”

In *re Brocking Mfg. Co.*, 35 Atl. 1012, the Supreme Judicial Court of Maine, held:

“ Stockholders of a corporation have no rights until all other creditors are satisfied. They have the full benefit of the profits made by the establishment, but can not take any portion of the funds until all other claims on them are extinguished. Their rights are not to the capital stock, but to the residuum after all demands on it are paid.

“ Where the funds of a corporation are used by its treasurer to pay for its stock purchased by him and other stockholders for themselves with the consent of all the stockholders and directors, he thereby became responsible for the whole amount of money so converted.

“ So long as he holds the money in the treasury of the corporation, it is there to answer for its debts, if necessary; and it should be devoted to that object so long as it may be required for that purpose, if he withdraws it, except according to law, he does so subject to that trust—the trust for the payment of the debts of the corporation, and needed for that purpose; and it is immaterial whether he got the money by fair agreement with his associates or by a wrongful act.”

A statute authorizing the reduction of capital stock and providing a method for doing so excludes the right to resort to any other or different method and does not authorize a bank to diminish its capital by purchasing its own stock, quoting Marowitz on Law of Private Corporations, section 112, *supra*.

—*Maryland Trust Co. v. Nat. Mech. Bank*,
(Md.) 63 Atl. 70.

In *Tait v. Pigott*, (Wash.) 73 Pac. 364, and 80 Pac. 172, a stockholder sold his stock to the corporation. Thereafter, the corporation became insolvent and the Receiver sued to recover the amount paid for the stock. Recovery was allowed, and it was held that such a purchase by the bank was a reduction of its capital stock which could only be done in the manner

provided by the code, and that it violated the provisions of section 4265, making it “unlawful to * * * in any way to pay to the stockholders or any of them, a n y part of the capital stock.” The Washington statute, unlike that of Nevada, did not expressly provide that a stockholder shall be liable for such sums as he may receive of the capital when reduced in violation of the method prescribed by statute. Nevertheless, recovery was permitted under the provision of section 4265 above quoted, which is otherwise identical with the Nevada statute (F. 38).

In *Fitzpatrick v. McGregor*, (Ga.) 65 S. W. 859, in a case where a stockholder surrendered his stock as a credit upon his note held by the corporation, it was held that the stockholder held the money or credit so received by him subject to the superior equities of the creditors of the corporation and that a receiver subsequently appointed could recover of the stockholder the amount of such credit.

In *Adams & Westlake Company v. Deyette*, 5 S. D. 418, 425, and 8 S. D. 127, an action was brought to set aside certain judgments rendered in favor of Deyette and Lewis against the Hicks-Trask Hdw. Co. by confession, for money loaned by them to said corporation with which to purchase certain of its shares of stock owned by Track and which was to their knowledge for such purpose. The court held (5 S. D. 425) :

“ Independently of the question of a c t u a l fraud in the case under consideration. the immediate effect of the purchase of the Trask stock

at a time when the corporation was financially embarrassed, if not, indeed, insolvent, was to increase its liability, without adding anything to its resources to which plaintiff could look for the security or payment of its claim; and such conduct is contrary to the spirit, if not the letter, of our statute, and is not upheld by the courts."

In *Currier v. Slate Co.*, 56 N. H. 262, it was held:

" The funds of an insolvent corporation can not be taken to buy a portion of its capital stock.
* * * It would be grossly inequitable and a fraud upon other creditors."

In *German Savings Bank v. Wulfekuhler*, 19 Kan. 60, an action was brought by the bank against Wulfekuhler to recover \$2100.00 alleged to have been wrongfully obtained through a stock surrender. Defendant was vice - president and a director of the bank, and, although the stock was purchased and held in his name, it really belonged to a partnership of which he was a member. The bank became embarrassed and defendant, operating through a third party, named Herman, as a dummy, sold the stock to the bank and received therefor \$2100.00, and it was considered by Herman and the cashier of the bank, who made the purchase, that the transaction was a sale to the bank. The court said:

" The supposed sale of said stock from Herman to the bank was void. The cashier had no

authority from the bank, or from any one else, to purchase it; and no one had any power to give him any such authority. A bank can not purchase its own stock, except in some few cases for the purpose of securing some previously-existing debt. There is no law that attempts to give a bank any such power. And the purchasing by a bank of its own stock is not one of the objects for which banks are created, and is not legitimate banking business. For a bank to use its funds in the purchase of stock, is to withdraw that much of its capital from legitimate banking business; and to purchase its own stock, is in effect a withdrawal of that much of its stock from actual existence, and in that way the bank might reduce the amount of its capital stock below the amount required by law and might also impair or even destroy all security given by law to the creditors of the bank. The law provides in effect that not only the bank, with all its property, shall be liable for its debts, but also that each stockholder in the bank to the amount of his stock, shall also be held liable. But if the bank may purchase in all its stock, and own it itself, then where would be the security to the creditors of the bank, except in the bank itself? They could not, after exhausting the property of the bank, find any stockholders to sue. The law never contemplated any such thing."

In *Hall v. Henderson*, 126 Ala. 449, 28 So. 531, an officer of a corporation sold his stock nominally to a third person, but in reality to the corporation itself. In permitting the Receiver of the corporation to recover therefor, the court rested its decision "upon the doctrine that it is a voluntary conveyance or transfer

as against creditors by the corporation of its assets," and said:

" The fact of the insolvency of the Alabama Terminal & Improvement Company is sufficiently proven by the evidence. But this fact is immaterial under the view we take of this case for if it be true that Henderson received the assets of the corporation knowingly, or under such circumstances as to put him upon inquiry that the money paid to him for his stock was the money of the corporation in consideration of a sale by him of the stock to the corporation direct, or through Woolfolk and Saportas to the corporation, *or if the consideration inuring to the corporation was his stock, then it is, in effect, a gift by the corporation to him of its assets, which is fraudulent as to creditors, whether the corporation was actually insolvent at the time the bargain for the sale of the stock was made or not.* There can be little doubt, if that were important, that it was on the road to financial disaster when the alleged sale was made, and was hopelessly insolvent long before Henderson received any of the payments made to him."

The principle of the Alabama case that "if the consideration inuring to the corporation was his stock, then it is, in effect, a gift by the corporation to him of its assets," and therefore fraudulent, when applied to the facts attending the surrender of the Wood stock, renders the fraud upon the Fairbanks Banking Company and its creditors and other stockholders doubly aggravated. It received nothing from Wood for the stock it issued to him, as hereinafter

pointed out, but, upon the surrender of the same by him, he received \$13,000.00 in cash from the capital contributed by the other stockholders. The Alabama court again condemns such transactions in *Hall v. Alabama T. & I. Co.*, 143 Ala. 464, 39 So. 285, in the following language:

“ The purchase by a corporation of shares of its own capital stock is a fraud upon its creditors. Such shares neither import nor represent any right or claim in or to, or to subject to their payment, the assets of the corporation as against the rights of creditors. Shares purchased by the corporation have no value as assets, for the payment of corporate debts. Obviously, therefore, the transaction involves on the one hand, the diversion of corporate assets to persons—shareholders—who have no debt against the company, nor the shadow of claim to or against its assets so far as creditors are concerned, and, on the other, the acquisition by the company in the stead of assets thus diverted, of a mere right to re-issue certain shares, or shares to a certain amount, in its capital; which right is of no value as assets for creditors. *Such a diversion of corporate property is, in respect of creditors, essentially a gift to the shareholders whose shares are purchased by the company—a purely voluntary transfer of corporate assets in fraud of corporate creditors, fraudulent and void as to creditors, and this, regardless of the intention actuating the company and the selling shareholders.*”

In *Crandall v. Lincoln*, 52 Conn. 73, the Receiver of an insolvent corporation recovered on behalf of its creditors the money paid out to its stockholders in

the purchase of shares held by them, although the stockholders supposed they were really selling to third persons and not to the corporation. The theory of the Connecticut court was that the capital stock of such a corporation is to be treated in equity as a trust fund in cases where the rights of creditors have been impaired by its misappropriation. Hence a stockholder, who receives a part of the capital in return for his stock, holds the money so received as trustee for the creditors and a Receiver may follow and recover it. In the Connecticut case, insolvency was not actually declared and receivers appointed until three years after the stock surrenders were made, which in point of time is very similar to the case at bar.

In *Commercial National Bank v. Burch*, 141 Ill. 519, 31 N. E. 420, one West transferred his stock in the J. L. Regan Printing Company, a corporation, to said corporation, and received in return therefor its note secured by an assignment of its book accounts. This note and said assignment, West transferred to the Commercial National Bank before maturity of the note. Subsequently, in an action praying for the dissolution of the Printing Company, Burch was appointed Receiver, and said bank filed its intervening petition seeking to establish a preference over other creditors, and have said book accounts, when collected, applied in discharge of said note. The court dismissed the intervening petition, which, on appeal, the appellate court affirmed. This action was affirmed by the Supreme Court in the following language,

holding that these book accounts, as part of a trust fund, might be followed and recovered even in the hands of an innocent assignee:

“ The transfer of the notes from West to the bank, having been made before the note was due, made the bank an innocent holder of the note for value, and protected it under the rule which protects the innocent purchaser of negotiable paper; but the book accounts were mere choses in action, and the assignment of them a transfer of so much of the property of the J. L. Regan Printing Company to West to satisfy said note. Each successive assignee of a chose in action takes it subject to the equities existing between the original assignor and his immediate assignee. Therefore, if West could not hold the book accounts as collateral security for the payment of the \$13,000.00 note, the bank could not hold them: for as far as the assignment of the book accounts was concerned, the bank stands in the shoes of West. It holds its negotiable promissory note relieved from all defenses, but held the book accounts subject to all defenses; therefore, subject to the claims of the creditors of the corporation.”

The court, in the case last cited, just preceding the foregoing quotation, said:

“ The question is settled by the decision of the case of *Clapp v. Peterson*, 104 Ill. 26, where it was held that the purchase of its own stock by a corporation by the exchange of its property of equal value, though made in good faith and without any element of fraud about it—there not being anything in the apparent condition of the

company to interfere with making of the exchange—will not be allowed where it injuriously affects a creditor of the company, even though the fact of the indebtedness was not at the time established or known to the stockholders. The court holds that the capital stock of an incorporated company is a fund set apart for the payment of its debts, and that the directors of the company hold it in trust for that purpose, and say ‘the shareholders of the corporation are conclusively charged with notice of the trust character which attaches to its capital stock.’ As to it, *they cannot occupy the status of innocent purchasers, but they are to all intents and purposes, privies to the trust. When, therefore, they have in their hands any of its trust fund, they hold it cum onere, subject to all equities which attach to it.*”

In *Bank v. Ross*, 68 Conn. 29, defendant, a stockholder in a corporation, sold his stock to the company and received in return a note and mortgage executed directly to him by one Turner, whose mortgage indebtedness to the company in an equal amount was thereby discharged. The trustee in insolvency was permitted to recover of the defendant the value of said asset. It was held (first Syl.) :

“ It is now well settled that in equity the capital stock of a corporation constitutes a trust fund for the payment of debts; and courts will be astute to detect and defeat any scheme or device which is calculated to withdraw this fund, or in any way place it beyond the reach of creditors.”

If a corporation be incompetent to release a subscriber to its capital stock whose subscription has not been paid, it is equally without authority, to expend the fund represented by its capital stock for the purchase of shares held by a stockholder who has paid for them.

—*Hamor v. Taylor-Rice Eng. Co.*, 84 Fed. 392, 397.

At the time the agreement was entered into by which the business of the partnership was transferred to the bank, Wood, though a member of said partnership, was also cashier of said bank, and was "personally interested adverse to said corporation" (F. 16). It was incumbent upon him to exercise the very highest of good faith in his dealings with it. Secret agreements by which personal adverse interests are advanced do not measure up to the standard of such good faith. Under such circumstances, it would be a flagrant fraud to give vitality to it. To countenance such secret arrangements and double dealing would be unconscionable. For this fraud, if for no other reason, equity will impress a trust upon the funds so received for the benefit of any person injured thereby.

In 3rd Pomeroy's Eq. Jur., (3rd ed), Sec. 1047, it is said:

" By the well settled doctrines of equity, a constructive trust arises whenever one party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is ben-

officially entitled to it; as, for example, when money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust, or violation of fiduciary duty, and the like.”

It is no answer to the contentions herein presented to say that the Receiver is seeking to rescind an executed contract between the partnership and the corporation, as was urged at the trial below. That agreement spent its force when the partnership property was transferred to the corporation and its shares of stock accepted by Wood and his partners. The taking back of this stock by the bank and the payment therefor out of its funds was a new and distinct, though wholly illegal, transaction—not between the partnership and the bank, but between Wood and the bank. The only pretense of a link between the two transactions is the so-called “oral understanding” which is void. It is as a thing which never had any existence. The funds received by Wood in exchange for his stock came into his hands impressed with a trust, and it is not only the right, but the duty of the Receiver to follow and recover them.

The stock came to Wood by virtue of said executed agreement. The Receiver is not seeking to rescind that agreement. It is the transactions thereafter had of which he complains. The right of a Receiver to recover from a stockholder funds of a corporation received by him in purchase of his stock is fully sustained by the authorities heretofore reviewed.

From the foregoing review of authority, the following principles are deducible :

1. Subscriptions to the capital stock of a corporation cannot be conditioned by collateral agreements.
2. A corporation cannot, out of its capital, purchase its own stock in the absence of statutory authority.
3. Where the statute provides a method for reducing the stock of a corporation, no other can be resorted to.
4. The capital stock of a corporation, whether paid in or promised to be paid in, is a trust fund to secure the c l a i m s of creditors and cannot be squandered or given away.
5. If a stockholder exchange his stock for any part of the capital of a corporation, he receives the same impressed with a trust in favor of creditors.
6. Such corporation or its receiver may follow and recover the funds so received, and in some instances may retake them even in the hands of an innocent transferree.
7. The basic principle upon which is grounded the right of the receiver of a corporation to recover against a stockholder for cancellation of his sub-

scription, or sale of his stock to the corporation, is public policy. The capital, whether paid in or to be paid in, must be kept intact for the benefit of its creditors. To accomplish this, the receiver may vacate such cancellation, levy and collect assessments for u n p a i d installments of subscription, and follow and recover as a trust fund any part of the capital which has been divided among the stockholders. To deny him these rights is to countenance a fraud.

8. The purchase of Wood's stock was, according to the laws of Nevada, an unlawful reduction of stock, and, by the same laws, a stockholder is liable for such sums as he may receive of the amount so reduced (F. 38).

III.

No consideration was received by the bank for this \$13,000. It is a part of the assets of the bank which were fraudulently given away. The Receiver can now recover it as a trust fund.

It will be remembered that said transfer of partnership business was made upon the basis of \$52,000.00 of assets in excess of its liabilities, one-fourth of which, or \$13,000.00 was the share of this defendant. This pretended excess was the consideration for the stock to be issued to Wood and his partner. But the court found (F. 23) that among said part-

nership assets were two worthless notes executed by the Tanana Electric Company, aggregating \$27,997.38. The court also found (F. 22) that of said assets there were loans and discounts past due when transferred and which still remain in the hands of the Receiver unpaid and uncollectible amounting to \$69,909.74, included in which is said Tanana Electric Company notes. As a further asset, there was transferred four-fifths of the capital stock of the Gold Bar Lumber Company for which the corporation paid \$341,949.00 (F. 25). Respecting this stock, the court found (F. 36) that at the time of said transfer said Gold Bar Lumber Company was closed down and remained so until the fall of 1908; that immediately prior to closing down, it had been operated at a loss; and that no dividend had ever been paid on said stock during the time it was owned by said bank. Included in the assets of said partnership was also an item of loans and discounts aggregating \$22,979.99 which on December 31, 1907, had been by said partnership charged to an account known as "doubtful account," and then depreciated 33 1/3%. These notes last referred to were also accepted and paid for by the corporation at their *face value* of \$22,979.99. They were all past due at the time of the transfer to the corporation, and of them there still remains in the hands of the Receiver unpaid and uncollectible the sum of \$12,860.61 (F. 22).

On March 23, 1908, pursuant to a resolution of the Board of Directors, adopted March 12, 1908, there was placed to the credit of said partners on the

books of the corporation the sum of \$39,642.81 as accrued interest to March 15, 1908, on the notes transferred from the partnership, one-fourth of which was subsequently paid to Wood in cash (F. 33), approximately \$10,000. The contract of March 16, 1908, providing for the transfer of the assets of the partnership to the corporation makes no provision for turning this accrued interest over to the partners. By its terms (see agreement, Rec., p. 29, referred to in F. 15) the partners "assign, transfer and set over unto the party of the second part all their outstanding loans and discounts as the same appear in the scheduled statement hereto attached marked Exhibit 'A', and the notes of the debtors given to evidence the amount of such loans and discounts," which notes are listed in said schedule at fixed amounts. When Wood, in April, 1908, signed this written agreement he did so "knowing that the same did not provide for the payment of said accrued interest" (F. 21). He, therefore, was not entitled to this interest under the contract.

It, therefore, appears from the Findings of the Court that by taking up the worthless Tanana Electric Company notes of \$27,997.38 and the payment of \$39,642.81 as accrued interest, \$67,640.19 were allowed the partners for which no assets were transferred to the corporation and which completely wipes out the pretended excess of \$52,000.00 over liabilities, which was the consideration for stock. This is true without any reference to other worthless and uncollectible notes which were transferred, or to the

depreciated "doubtful accounts" for which full value was paid, or to the capital stock of the Gold Bar Lumber Company, which certainly, under the circumstances, ought to have been depreciated some instead of increasing it \$68,318.69, as was done by increasing the value of its timber lands one-third (see agreement at Rec., p. 42, referred to in F. 15).

By means of this pretended excess of assets over liabilities, one-fourth of which or \$13,000.00 belonged to Wood, he paid for the stock in question. A certificate for the same, of the par value of \$13,000.00, was written up in his name, and, although never detached from the stock book, it was carried on the books of the bank as outstanding stock from March 16, 1908, to June 30, 1908 (F. 29), during all of which time Wood was the cashier of the bank (F. 27). On June 29, 1908, Wood tendered his resignation as cashier and the same was accepted to be effective at the close of business on June 30, 1908 (F. 27). On June 30, 1908, and prior to the time said resignation became effective, a certificate of deposit in the sum of \$13,000.00 signed by Dusenbury as assistant cashier, was issued to and accepted by Wood in lieu of said stock, and said shares of stock were on the same day charged to treasury stock on the books of said bank. (F. 30.) Later on, the certificate of deposit was converted into cash and the proceeds thereof withdrawn from the bank (F. 31).

On these facts the complaint charges that the withdrawal of said \$13,000.00 from the assets of the

bank was without consideration and was wrongfully and fraudulently done in violation of the terms of said written agreement and the rights of the creditors of said corporation. (Complaint, Par. 13, Rec., pp. 9-10.)

Wood must have known, or by the exercise of the slightest care could have known, that the stock which he was surrendering had not been paid for because of the facts above stated. As heretofore pointed out, the Receiver is not seeking to rescind the executed agreement between the partnership and the corporation. By that agreement, Wood acquired the stock. The taking back of this stock by the bank and payment therefor out of its funds was a new and distinct, though illegal, transaction—not between the partnership and the bank, but between Wood and the bank. Let it be assumed that the transaction by which Wood acquired his stock could not be rescinded, and clearly such rescission is not the purpose of this action, nevertheless the fact remains that the bank received nothing for said stock. It had no property of the defendant which stood back of the stock and which the bank retained when the stock was surrendered. The bank, although in existence but two months and a half, during all of which time Wood was its cashier, had impaired its capital, as shown by its books to the extent of \$38,918.47 (F. 35), without regard to the depreciation of its assets hereinbefore commented on. The stock therefore represented no right to share in surplus or undivided profits, because the bank had none (F. 39). What then

did the bank get for its \$13,000.00 in cash? Nothing, although its capital suffered a further impairment to that extent.

Suppose an insolvent bank should wish to borrow \$13,000 and should execute its note in that sum payable to its cashier from whom it expected to borrow the money, and the cashier should turn over to the bank as the proceeds of the note \$13,000 in bogus money. The transaction is entered upon the books of the bank as a genuine transaction. Later on, the cashier demanded his money and the assistant cashier turned over to him \$13,000 in good money, cancelled the note, and entered that transaction upon the books of the bank. Would any court permit the cashier to retain those funds against the creditors of the bank or even the bank itself? If implied assumpsit did not afford the necessary remedy, a resort to equity could be had and a constructive trust decreed (3rd Pomeroy's Eq. Jur., Sec. 1047).

In the case at bar, the money of the bank was obtained under the guise of a stock transaction. Wood agreed to buy stock of the bank at the par value of \$13,000.00 to be paid for in property. The bank accepts Wood as a stockholder and writes up the stock certificate, which is not detached from the stock book although carried on the books of the bank as outstanding stock. Wood is cashier of the bank and Dusenbury its assistant cashier. Wood fails to deliver the property, but does deliver an instrument pretending to do so. Later on, upon his demand, the

stock certificate is cancelled, said shares charged to treasury stock, and the assistant cashier issues to Wood the bank's certificate of deposit for the par value of the stock, \$13,000.00, which is subsequently cashed. When the transaction occurred, the liabilities of the bank exceeded its assets approximately \$39,000 as shown by the books of the bank. The money which Wood received was known by him to be a part of the assets of the bank, and for it he gave nothing. It came into his hands impressed with a trust in favor of the bank's creditors, and that trust has never been discharged. It is respectfully submitted that in good conscience he should not be permitted to keep it.

In *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203, it is said:

“ The capital paid in, and promised to be paid in, is a fund which the trustees cannot squander or give away.”

In *Sangor v. Upton*, 91 U. S. 56, 23 L. ed. 220, it is said:

“ The capital stock of an incorporated company is a fund set apart for the payment of its debts. * * * The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation, for their security.”

In *Thompson v. Reno Savings Bank*, 7 Pac. 68, being the Nevada case heretofore referred to at length, the capital stock of a corporation is declared to be "a trust fund for the benefit of the general creditors." Wood, having given no consideration therefor and acting with full knowledge of all the circumstances, took this \$13,000.00 impressed with such trust, and subject to the right of the Receiver to follow and recover it for the benefit of the general creditors.

In the case of *Commercial National Bank v. Burch*, (Ill.) 31 N. E. 420, heretofore considered, the court, speaking of shareholders who receive the property of a corporation in exchange for their shares of stock, and after stating that the directors of an incorporated company hold the capital stock in trust, said:

"As to it, they cannot occupy the *status* of innocent purchasers, but they are, to all intents and purposes, privies to the trust. When, therefore, they have in their hands any of this fund, they hold it *cum onere* subject to all equities which attach to it."

The foregoing principle is re-affirmed in *Olmstead v. Vance & Jones Co.*, (Ill.) 63 N. E. 634, 636, and the court added:

"And this is so irrespective as to whether there were fair dealings or actual or constructive fraud between the parties."

In *Hall v. Henderson*, 126 Ala. 449, 28 So. 531, the court said:

“ The fact of the insolvency of the Alabama Terminal and Improvement Company is sufficiently proven by the evidence. But this fact is immaterial under the view we take of this case for if it be true that Henderson received the assets of the corporation knowingly * * * or if the consideration inuring to the corporation was his stock, then it is, in effect, a gift by the corporation to him of its assets, which is fraudulent as to creditors, whether the corporation was actually insolvent at the time the bargain for the sale of the stock was made or not.”

In *Putnam v. N. A. & S. C. J. R. R. Co.*, (U. S.) 21 L. ed. 361, 363 (reported in 16 Wall. 390 under title *Burke v. Smith*) it is said:

“ And it is clear that the directors of a company, organized under the law, have no power to destroy it, *or to give away its funds*, or deprive it of any means which it possesses to accomplish the purposes for which it was incorporated.”

Interest.

Plaintiff is entitled to interest at the legal rate of 8% from June 30, 1908.

“ When money has been misappropriated or converted to his own use by defendant, interest is given as damages to compensate the complainant for the loss of the use of his funds. In cases of the latter class, its allowance is sometimes a matter of discretion; but it is a general rule, both at law and in equity, that, whenever one has wrongfully detained or misappropriated the moneys of another, he must pay interest at the legal rate from the date of the misappropriation or from the beginning of the detention.”

—*Cooper v. Hill*, 94 Fed. 582, 36 C. C. A. 402, 409;

Burrows v. Niblack, 28 C. C. A. 130;

Bundy v. Jackson, 24 Fed. 130.

It is respectfully submitted that upon the facts found, the Decree of the lower court ought to be vacated and a Decree entered in this court in favor of appellant and against appellee for \$13,000.00 with interest and costs.

Respectfully submitted,

O. L. RIDER,
Attorney for Appellant.

No. 2594.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

F. G. NOYES, as Receiver of Washington-Alaska Bank, a
Corporation,

Appellant,

vs.

R. C. WOOD,

Appellee.

BRIEF OF APPELLEE.

JOHN L. MCGINN,
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CURTIS HILLYER,
Of Counsel.

Filed this.....day of May, A. D. 1917.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

The James H. Barry Co.
San Francisco

Filed

MAY 17 1917

F. D. Monckton,
Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

F. G. NOYES, as Receiver of Washing- ton-Alaska Bank, a Corporation,	}	No. 2594
vs.		
R. C. WOOD,	}	
	}	

Appellant,

Appellee.

BRIEF OF APPELLEE.

This was an action brought by Noyes, as receiver for the Washington-Alaska Bank, a corporation formerly known as Fairbanks Banking Company, to recover of the defendant Wood the sum of \$13,000.00, which grew out of the following transaction:

The Fairbanks Banking Company was originally a partnership, consisting of the defendant Wood, one Hill and one Barnette. The company closed its doors in the latter part of 1907, and a reorganization was projected by the depositors. At the time of the proposed reorganization, the defendant Wood was in

Seattle. A meeting was held at Fairbanks, and an investigation was had into the assets of the partnership, and as a result it was decided to form a new corporation, to be known as the Fairbanks Banking Company, and to be chartered under the laws of Nevada, for the purpose of taking over the assets of the partnership. A committee was appointed which investigated the assets, and after so doing fixed a valuation on the equities of the partnership at \$288,000.00. Under the terms of the partnership agreement its capital, consisting of \$200,000.00, was advanced by Barnette. He had a one-half interest in the profits of the partnership, and Wood and Hill each one-quarter. Under the arrangement made with the stockholders, it was agreed that Barnette should leave on deposit with the corporation the sum of \$200,000.00, and his share of the equity above that, \$44,000.00, issued to him in stock of the new corporation. Wood and Hill likewise were each to be entitled to \$22,000.00 worth of stock in the new company; this representing their interest. They were to have until July 1, 1905, to elect whether to take money or stock. A contract was accordingly drawn up. It was signed by the new corporation and likewise by Barnette and Hill. Barnette also subscribed Wood's name to the agreement, although Wood was at that time still in Seattle and there was nothing to show that Barnette had any authority to sign Wood's name. Before the transaction was finally consummated, the amount which was coming to the

partners was by agreement with the corporation reduced from \$288,000.00 to \$252,000.00. This made the proportionate share of Wood \$13,000.00. Upon his return to Fairbanks, Wood signed the agreement, but at the time he did so he had an understanding with the officers of the bank that he should have until July 1st, 1908, to decide whether he would take the \$13,000.00 in stock, or would receive the equivalent in money.

The findings of the Court upon this subject are as follows:

VII.

That * * * in the fore part of January, 1908, a large number of business, professional and mining men * * * met in the town of Fairbanks, Alaska, for the purpose of organizing a corporation to purchase and take over and absorb the business of the Fairbanks Banking Company, a copartnership, and at said meeting negotiations were begun by said proposed incorporators with said copartnership for the purchase of the same. That at said meeting a committee was appointed to go into the details of the reorganization of the Fairbanks Banking Company and to report a basis upon which the business should be taken over *
* * (p. 70).

VIII.

That said committee met on the 5th day of January, 1908, and, after investigating the affairs of the bank, made the following report to be pre-

sented for the consideration of the proposed new corporation * * *

(g) That should James W. Hill and R. C. Wood not take the full forty-four thousand dollars in stock in the new corporation, the balance of the amount not so taken to be paid to them not later * * * (p. 71).

IX.

That said report was on January 6, 1908, submitted to said proposed incorporators and at said meeting the said report was read and passed on section by section, as read, and on motion duly made and carried was adopted and ordered kept as a part of the records of said meeting (p. 73).

XIX.

That * * * during all of the negotiations * * * defendant Wood was in Seattle (p. 77).

XXI.

That the defendant Wood returned to Fairbanks, Alaska, some time in the month of April, 1908, and upon his return he signed said written agreement so entered into as aforesaid, knowing that the same contained said clause requiring him to take stock for his share of the assets of said partnership so transferred to said corporation in excess of the liabilities thereof as aforesaid, and also knowing that the same did not provide for the payment of said accrued interest, but *with an oral understanding between himself and the officers of said bank that he might have, in accordance with said resolution, until July 1, 1908, to elect either to take stock in said corporation or cash for his*

share of the assets of said partnership so transferred to said corporation (p. 77).

XXVI.

That at the first meeting of the Board of Directors, held on the 12th day of March, 1908, the defendant Wood was elected Cashier of said bank, at which time he was then in the City of Seattle, Washington, as aforesaid. Immediate notice was given to him of said election (p. 79).

XXVII.

That said Wood accepted said office of cashier while in the said city of Seattle, and, on the 16th day of March, 1908, entered upon the discharge of his duties as such cashier, and, upon his return to said Fairbanks in April, 1908, as aforesaid, entered actively upon such duties and continued to so act until June 29, 1908, when he tendered his resignation as such cashier, and the same was accepted by the Board of Directors, to be effective at the close of business on June 30, 1908, and one B. R. Dusenbury, who was then assistant cashier, was elected to succeed Wood as cashier (p. 79).

XXVIII.

That at the time said Wood tendered his resignation as cashier, as aforesaid, he demanded that there be paid to him the amount of his interest in said partnership assets, to-wit, \$13,000.00 (p. 80).

XXIX.

That a certificate for 130 shares of the capital stock of said corporation had been written up in

the name of the defendant Wood, of the par value of \$13,000.00, but the same was never detached from the stock book. That said 130 shares were carried on the books of said bank as outstanding stock from March 16, 1908, to June 30, 1908 (p. 80).

XXX.

That on the 30th day of June, 1908, with the knowledge, consent and approval of the officers and directors of said bank, a certificate of deposit was issued to and accepted by the said Wood in the sum of \$13,000.00, in lieu of said stock, which said certificate was signed by the said B. R. Dusenbury as assistant cashier prior to the time when the said resignation of the said Wood as cashier became effective, and said shares of capital stock were on the same day charged to treasury stock on the books of said bank (p. 80).

XXXI.

That subsequently the said Wood drew out in cash from the funds of said bank the amount of the said certificate of deposit, to-wit, \$13,000.00 (p. 80).

In its opinion the Court said:

"Wood was absent from Fairbanks during all of this time, and did not return until about the middle of April, 1908, and it seems that at this time the agreement with the corporation was signed by him, his name having been signed to the stock subscription list on his behalf by Barnette. He testified that it was distinctly understood between him and the directors at the time he did sign the agreement, that he should have the right to take cash, instead of the par value of the shares subscribed

for, on July 1st, and that as evidence of such understanding there was then shown him the report of the committee of January 5th and the minutes of the corporation, wherein this was set forth. Prior to his returning to Fairbanks he had performed some acts as cashier of the corporation in Seattle, and he continued to act as such cashier until June 30th. On June 29th he tendered his resignation, and on July 1st was paid \$13,000.00, the par value of the stock allotted to him. The certificates for this stock seem never to have been in his possession, but to have remained undetached in the stock book of the corporation. Whatever may be said of the rights and liabilities of Wood, under the written agreement of March 16, if this were still an executory agreement, it seems that now, *the agreement having been fully executed, in accordance with what was then the understanding of all the parties, and cash, in place of stock, delivered to Wood, the receiver is not now in a position to set aside this executed contract, and to enforce the terms of the written contract, although such written contract varies, in some respects, from the one actually carried out by the parties.*" (No. 2528, p. 1210).

The following stand out boldly from the findings of fact:

1. That on January 5, 1908, the incorporators' committee proposed to give to Wood until July 1, 1908, to decide whether to take stock or cash for his interest in the copartnership. (Finding VIII (g) p. 72).

2. That on January 6, 1908, the proposed incor-

porators formally agreed to this proposition. (Finding IX, p. 73).

3. That Wood was not in Fairbanks until April, 1908. (Finding XXI, p. 77).

4. That Wood first signed the subscription in April, 1908, and at that time there was an oral understanding between him and the officers of the bank that he might have, *in accordance with said resolution*, until July 1, 1908, to elect either to take stock in said corporation or cash for his share of the assets of said partnership. (Finding XXI, p. 77).

5. That the stock certificate for the 130 shares was never detached from the stock book. (Finding XXIX, p. 14).

The findings contain much matter that is foreign to the issues of the case, much that is purely evidentiary matter, and much that is mere conclusion of law.

Appellant's contentions are discussed by him under three heads:

(1). He says: "The secret oral understanding was void."

To which we reply:

I. There was no *secret* oral understanding.

II. There was a conditional stock subscription which gave Wood the right to take cash in lieu of stock.

(2) He asks: "Is Wood liable to the Receiver for the amount received for the surrender of his stock?"

(a) Could Fairbanks Banking Company purchase its own stock, especially out of its capital?

(b) If it could not, can the receiver now recover the purchase money?"

To this we reply:

II. This was not the case of a corporation purchasing its stock but the case of a conditional subscription.

III. The agreement is executed and it is now too late to set it aside.

IV. None but a creditor who was such at the time would have a right to complain.

V. As a condition precedent to this action the stock should have been tendered back.

(3) He contends: "No consideration was received by the bank for this \$13,000.00. It is a part of the assets of the bank which were fraudulently given away. The receiver can now recover it as a trust fund."

To this we reply:

VI. The findings do not warrant the statement that no consideration was received by the bank for this \$13,000.00.

Finally as an answer to all of appellant's case the appellee urges:

VII. The findings omit to dispose of the affirma-

tive defense of accord and satisfaction and the presumption on appeal is that the evidence upon that point sustained the judgment.

I.

THERE WAS NO SECRET ORAL UNDERSTANDING.

This case is before the Court on the findings. There is no finding that the oral understanding was secret. There is nothing in the findings inconsistent with contemporaneous knowledge and assent on the part of every stockholder and creditor of the corporation.

In *Porter v. Plymouth Gold Mining Co.*, 74 Pac. 938, at the time of sale of stock by a corporation, it agreed to repurchase if the buyer was dissatisfied.

It was claimed that the transaction amounted to secretly allowing the subscriber to withdraw his subscription. In this connection the Court said:

“Did such purchase secretly allow a subscriber to withdraw his subscription? It must be remembered that appellants did not become subscribers for any stock of the respondent company, and therefore there could have been nothing due to the company from them as subscribers. By the transaction they became the *bona fide* owners of the stock as full paid, and could never be called on, at least by the company, to pay any further sum on the stock. Therefore, the numerous cases relied on by the counsel for the respondent of secret contracts between a corporation and a subscriber for stock, by which the subscriber's liability for further payment on their subscription is released, while excellent law, have absolutely no bearing upon this

case. The Supreme Court of Illinois well says, with reference to these cases: 'So the question is not whether applicant may release the village from paying for and receiving the shares subscribed for, but whether appellant has power to purchase shares of its own stock, paid for, issued to, and held by the village.' *Chicago, Pekin, etc., Ry. v. Marseilles*, 84 Ill., 643. In the following cases, among others, contracts similar to the one in question were held not to be *ultra vires*, and were enforced against the corporations: *Browne v. Paul Plow Works*, 62 Minn., 90, 64 N. W., 66; *Vent v. Duluth C. & S. Co.*, 64 Minn., 307, 67 N. W., 7; *Freemont Carriage Co. v. Thomsen* (Neb.), 91 N. W., 376; *C. P. & S. W. R. R. v. Marseilles*, 84 Ill., 145; *Howe Grain, etc., Co. v. Jones*, 21 Tex. Civ. App., 198, 51 S. W., 24; *New England Tr. Co. v. Abbott*, 162 Mass., 148, 38 N. E. 432, 27 L. R. A., 271; *West v. Averill Co.*, 109 Iowa, 488, 80 N. W., 555. We are satisfied from the foregoing authorities that the contract was a valid and enforceable one, and that the Court erred in holding that it was *ultra vires*."

II.

THIS WAS THE CASE OF A CONDITIONAL SUBSCRIPTION AND AS SUCH IS NOT WITHIN THE RULE OF THE CASES CITED BY APPELLANT.

Preliminary to discussing the phase of the case, we desire to emphasize some portions of the findings:

1st. When the original incorporators met and agreed on the terms of organization, it was agreed among them that if Wood did not take stock any

money coming to him should be paid to him not later than July 1, 1908 (p. 72). Wood at the time was not in Fairbanks, so as far as he was concerned this was the stockholders' own proposal. (Finding XIX, p. 77.)

2nd. While Wood was still away, namely, on February 29, 1908, he offered to sell his *stock*. He had no stock. The authorization for the issuance of the stock did not take place until March 12, 1908 (p. 75). What Wood referred to when he offered to sell his "stock" was his "future right" to stock.

3rd. On his return he signed an agreement. This was between the new bank and the partners. It contained a clause requiring him to take stock for his share of the assets of said partnership (p. 77). *But with an oral understanding between himself and the officers of said bank that he might have in accordance with said resolution, until July 1, 1908, to elect either to take stock in said corporation or cash for his share of the assets of said partnership so transferred to said corporation* (p. 78).

There was nothing "secret" about the oral understanding. It emanated originally from the subscribers themselves.

4th. As evidence of the intention of all parties to leave the matter open and optional with Wood, is the fact that the certificate for 130 shares made out in his name was never detached from the stock book (p. 80).

Appellant asks:

(a) Could the Fairbanks Banking Company purchase its own stock especially out of its capital?

(b) If it could not, can the receiver now recover the purchase money?

As to the first of these propositions, we beg to refer the Court to our brief in No. 2528, in which the question is fully discussed at pages 80 *et seq.*

In that case there was nothing in the pleadings to show what the law of Nevada was on the subject of the purchase of its own stock by a corporation.

In this case counsel has pleaded the Nevada law (p. 15) relating to stock purchased by the corporation at delinquent sales, but there is nothing in his complaint to show that the Nevada law forbids a corporation to purchase its own stock in any other case.

The pleading must be taken most strongly against the pleader.

Coming now to the effect of the contemporaneous oral understanding between Wood and the company, we find the authorities harmonious on the proposition that a corporation may sell its stock with an agreement to repurchase which is enforceable even in those jurisdictions which forbid a corporation to purchase its own stock.

In the case of *Porter v. Plymouth Gold Mining Co.*, 74 Pac., 938, the appellants had purchased 4000 shares of the capital stock of respondent for \$2000.00. At

the time the purchase was made the respondent agreed in writing with the appellants if, at the expiration of six months from date of sale, appellants should become dissatisfied with the stock or its earning power as an investment, they should be entitled to return the stock to said respondent upon notifying respondent of their intention so to do, and that respondent should relieve them from all liability thereon, and repay to them the said \$2000.00 with interest at the rate of eight per cent from date of payment. The Court said:

“Two objects were evidently in the minds of the contracting parties at the time this contract was entered into, which were sought to be accomplished by the contract, viz., the sale of the stock and a contract for its repurchase. The company desired to sell the stock; appellants desired to purchase the same, but were unwilling to do so without the company bound by contract to repurchase it upon the happening of certain events. The purchase and payment of the purchase price was a consideration to the company for its promise to repurchase the stock. There was but one contract, viz., for the sale and repurchase of the stock, each object being a consideration for the other. This contract was entire and indivisible. The sale could not be sustained unless the contract of repurchase could be enforced. Therefore, if a portion of the contract is *ultra vires*, the whole contract must fall. The corporation cannot be heard to say that the sale was valid and the contract to repurchase was void without rescinding the sale and returning the purchase money, thus placing the other party in *statu quo ante*. The appellants have executed the contract of purchase on their part by the payment of the purchase price. The corporation, therefore,

has received from them something of value, which it would not have received except for its contract of repurchase. It cannot be heard to say: 'True, I have received your two thousand dollars, which I promised to return to you upon the happening of certain events, but my promise in that regard was and is beyond my power to enter into, and, although the contemplated events have occurred, I will keep your money, and will not perform my contract. Such action, if allowed, would be a reproach upon the law. It is not honest or right, and right is the basic principle of all law.'

In the case of *Dickinson v. Zubiarte Mining Co.*, 11 Cal., App. Rep., 656, the complaint alleged the conditional purchase of mining stock of the defendant corporation under an express agreement that if plaintiff was dissatisfied with the purchase after examination of the mining property, the company would repay and refund the price of the mining stock. The Court said:

"The transaction did not constitute an unconditional original subscription to the stock of defendant, but was a conditional purchase of stock, which the evidence tended to show had been theretofore issued to another and by him returned to the company. The purchase was made upon conditions fully set forth in a written contract which was contemporaneous with and part of the transaction of purchase. (*Jefferson v. Hewitt*, 95 Cal., 525 (30 Pac., 772)). Nor was the agreement secret. On the contrary, it appears from the evidence of witness Sharp that early in January, at least, plaintiff was, through him, advised by the secretary of the company that 'they had a copy of the

agreement in the office, and that the matter would be presented to the board of directors at the next meeting.' Neither was there any want of consideration. The purchase price paid subject to the conditions contained in the agreement was a sufficient consideration for defendant's promise to repay if plaintiff, after inspection of the property, was dissatisfied therewith. In the absence of the rights of creditors being involved, and none appear, we perceive no reason why this agreement should not be enforceable against the corporation. (*Vent et al. v. Duluth Coffee & Spice Co.*, 64 Minn., 307 (67 N. W., 701). Says Mr. Cook in his work on corporations (Sec. 83): 'Instead of subscribing for stock, a party may make a contract with a corporation to take the stock with the right to return it and receive back the purchase price within a certain time. Such a contract is legal, and the stock may be returned and the money recovered, if corporate creditors' rights do not intervene.' "

In the case of *Schulte v. Boulevard Gardens Land Co.*, 164 Cal., 464, the defendant had sold certain shares of stock, with the following agreement: "We further promise and agree on behalf of the Boulevard Gardens Land Company, that should the purchaser of said stock certificate at any time prior to the payment of dividends equaling the face value of said stock wish to sell the same, we will repurchase it at par, etc." The Court said:

"The position of the respondent is that the contracts for the retaking by the corporation of its own shares are illegal and void, as in violation of the provisions of Section 309 of the Civil Code, prohibiting directors of corporations from dividing,

withdrawing or paying to the stockholders, or any of them, any part of the capital stock, or from reducing or increasing the capital stock, except as provided in the section. The phrase 'capital stock,' as used in this section, and in the section of the Practice Act from which the code provision was drawn, has been construed in various decisions of this Court. Its meaning has been definitely settled to be, not the shares of which the nominal capital is composed, but the actual capital, i. e., assets, with which the corporation carries on its corporate business. (*Martin v. Zellerbach*, 38 Cal., 309 (99 Am. Dec., 365); *San Francisco & N. P. R. R. Co. v. Bee*, 48 Cal., 398; *Kohl v. Lilienthal*, 81 Cal., 385 (6 L. R. A., 520, 20 Pac., 401, 22 Pac., 689); *Tapscott v. Mex. Col. etc., Co.*, 153 Cal., 667 (96 Pac., 271); *Burne v. Lee*, 156 Cal., 222 (104 Pac., 438). Although the prohibition runs, in terms, only against the directors, the effect of the section is to deprive the stockholders as well of power to do the forbidden acts. (*Kohl v. Lilienthal*, 81 Cal., 385 (6 L. R. A., 520, 20 Pac., 401, 22 Pac., 689); *Burne v. Lee*, 156 Cal., 222 (104 Pac. 438). * *

"In the case at bar, however, we have something more than a mere attempt by a stockholder to sell, and by the corporation to buy, shares of stock. The plaintiff is seeking to enforce a part of an entire contract under which the stock was originally issued to him. The right to return the stock and to receive the sum agreed to be paid upon such return was a material and indivisible part of the consideration upon which the plaintiff agreed to become a stockholder. As between the parties, it would be manifestly unjust to permit the corporation to retain the money paid by plaintiff, and at the same time to repudiate the promise which it gave in exchange for the money. The obligation to pay upon a return of the shares, the sum agreed to be paid, is not to be viewed as a new undertaking

arising after the plaintiff has assumed the relation of stockholder. It came into being coincidentally with the contract by which plaintiff became a stockholder. The sale to plaintiff was conditional. He never became a stockholder except subject to the qualification that he might return his shares upon the stipulation terms.

"The great weight of authority is in accord with this view. Contracts of the kind under discussion have generally been sustained, this, too, in jurisdictions in which corporations are not permitted to purchase their own stock. (*Browne v. St. Paul Plow Works*, 62 Minn., 90 (64 N. W., 66); *Vent v. Duluth C. & S. Co.*, 64 Minn., 307 (101 Am. St. Rep., 569, 74 Pac., 938); *Sweeney v. United Underwriters Co.* (S. D.), 137 N. W., 379; *Jones v. Johnson*, 86 Ky., 530 (6 S. W., 582); see, also, 10 Cys., 416; 2 Cl. & M. Pr. Corp., sec. 475; 1 *Cook on Corporations*, 6th ed., secs. 83, 170."

In the case of *Ophir Consolidated Mines Co. v. Brynteson*, 143 Fed., 829, the corporation sold Brynteson \$15,000 of shares of its capital stock, with an agreement binding it to return to him \$15,000 with interest at the rate of six per cent. per annum eighteen months after the date thereof, if said John Brynteson be not satisfied with the aforesaid investment. The Court said:

"The corporation defendant is incorporated under the laws of Colorado, and it is contended that the contract violates Section 485, Mills' Ann. St. Col., which prohibits the use by corporations of any of their funds 'for the purchase of stock in their own company or corporation, except such as may be forfeited for the non-payment of assessments

thereon.' This agreement is in no sense within the meaning or object of the provision referred to. The stock was held in the treasury of the company to raise funds for improvements, upon such terms of sale as were adopted by the president. The right to so hold and own the stock remains in the corporation until an absolute sale is made. No such sale arose under the agreement in suit. It was of the well-recognized class, known as a contract of 'sale or return,' as defined in *Sturm v. Boker*, 150 U. S., 312, 328, 14 Sup. Ct., 99, 104, 37 L. Ed., 1093, where the title passes for the time being, but subject to the option of the purchaser to rescind and return the property within the time stipulated. With the exercise of the option the contract of sale terminates and the right and title of the corporation is restored to its original status. No sale has been accomplished, and no purchase or repurchase arises upon the part of the corporation through this return of its unsold stock. As held in the recent Minnesota case of *Vent v. Duluth Coffee & Spice Co.*, 67 N. W. 70, such transaction is not *ultra vires*, within the rule applicable to purchase of stock." * * *

"The contention that the contract was fraudulent as to other stockholders and creditors requires no discussion, under the foregoing view that no sale of stock was effected, so that the agreement to repay the investment for purchase money, if the stock was not purchased, called for no diversion of corporate funds—plainly distinguishable from the cases cited of release of subscribing stockholders."

In the case of the *United States Mineral Co. v. Camden*, 106 Va., 663, 117 Am. St. Rep., 1028, the defendant sold 25 shares of its capital stock of the par value of \$100.00 per share, upon the terms and agree-

ment that within four months it would redeem the stock so issued at its face value, etc. The Court said:

“There can be no question that the defendant had the power to purchase its own stock under the circumstances of the case stated in the declaration.”

If it be contended that the agreement between Wood and the corporation that the stock subscription was to be conditional, is in parol, and that therefore evidence of that agreement would have been inadmissible, our reply is that the rule that parol evidence is not admissible to vary the terms of a written agreement, is a rule of evidence only, and could only be invoked by the bank in the event that it had brought suit upon the subscription, and the defendant undertaken to set up the parol agreement in defence. If, however, the parol agreement were in fact made and the bank knew it and chose to perform its contract according to the actual agreement rather than to invoke a technical rule in order to evade it, and if the parties were governed solely by the agreement actually made, and not by the means of proof of it, and chose to perform that contract as agreed upon, the executed contract would be binding upon all concerned. The rule as to a parol modification of a written contract would have no bearing.

Indeed even in the teeth of a statute forbidding the modification of a written contract except by an agreement in writing or an executed oral agreement, it is

held that an oral agreement may be substituted for a former written contract and that it is not a modification of the written contract provided the substituted oral agreement is valid and enforceable.

Pearsall v. Henry, 153 Cal., 314.

A fortiori if the substituted oral agreement has been completely executed.

III.

THE AGREEMENT IS EXECUTED AND IT IS NOW TOO LATE
TO SET IT ASIDE.

It appeared from the findings that at the meeting of the Board of Directors of the corporation, held on March 12, 1908, a resolution was passed to the effect that should this defendant not take the full amount of stock he was entitled to in the new corporation, the balance of the amount not so taken should be paid to him not later than July 1, 1908 (p. 5). At this time the defendant was still in Seattle. When he returned and signed the subscription agreement this question came up again, and the understanding was expressly had in conformity with the resolution. Up to that time Wood had not signed the subscription contract, but it is plain from the finding that it was the understanding and intention of all concerned that he was to be left free to take cash in lieu of stock. It was further confirmed by the fact that the certificate of stock was

never in fact issued to him, and finally when on his retirement from the corporation he asked for, and the bank paid him the \$13,000.00, as had been agreed upon, the oral understanding had become an executed agreement.

IV.

NONE BUT A CREDITOR WHO WAS SUCH AT THE TIME
WOULD HAVE A RIGHT TO COMPLAIN.

The complaint fails to show that at the time the stock was taken over and the money paid there were any existing creditors of the bank, and fails to state that any then existing creditors of said bank have not been paid. The law is well settled that "creditors whose debts were contracted subsequent to the reduction of capital stock can only look to the capital stock as reduced, for security."

1 *Cook on Corporations*, 289.

"Corporate creditors who become such after the reduction of the capital stock has been made cannot complain that such reduction was irregularly made and that the holders of the cancelled stock are consequently still liable."

1 *Cook on Corporations*, 289.

Hepburn v. Exchange, 4 La. Ann. 87.

Palfrey v. Paulding, 7 Pa. Ann., 363.

Cooper v. Fredericks, 9 Ala., 738.

Re State Ins. Co., 14 Fed., 28.

Gade v. Forrest, 165 Ill., 367; 46 N. E., 286.

In *Mannington v. Hocking Valley Ry. Co.*, 183 Fed., 146, it is said:

"The controversy in this case is wholly between the corporation and four of its stockholders. No creditor is complaining, and no one can complain, because the recitals in the articles of incorporation were notice to him of the reserved right to redeem. Future creditors cannot complain, because they will be held to have given credit upon the amount of the stock then outstanding. They cannot even claim that the repurchase was irregularly made. *Cook, Corp.* (4th Ed.), Sec. 289."

And in *Thomas v. Wentworth Hotel Co.*, 117 Pac., 1041, it is said:

"Stating the rule in its general sense, it is correct to say that a stockholder may not be released from liability on his contract of subscription without the consent of his fellow stockholders, as well as that of the creditors of the corporation. The reason for the rule is found in the doctrine, now thoroughly established by the decisions of the American courts at least, which views the subscribed capital stock of a corporation, both paid and unpaid, as trust fund, which the stockholders and creditors have the right to insist shall not be reduced, diminished, or impaired, except with their consent. *Thompson on Corporations*, Vol. 1, par. 765; *Morgan v. Struthers*, 131 U. S., 246, O. Supp. Ct., 726, 33 L. Ed., 132. In considering the application of the rule just stated, however,

it must be kept in mind that the creditor of a corporation is not a direct party to the contractual relation entered into between the corporation and a subscriber to its capital stock. Under the trust fund theory, the creditor is presumed to have given credit upon the faith that the working capital of the corporation, whether actually paid in or promised to be paid, will be kept available to satisfy his debt. The corporation, then, cannot, without committing a fraud against such creditor, wipe out the fund, either by returning the money paid by subscribers or releasing the obligors on their unpaid subscription contracts.

"The rights of the creditors, nevertheless, do not extend so far as to permit him to interfere and prevent a stockholder from altering his relation toward the corporation with respect to his membership therein as a holder of its shares. It must be admitted that a solvent stockholder may make a valid agreement with the corporation, securing first the consent of all the other stockholders thereto, by which he may surrender his stock and be released on his subscription contract. Such an agreement will be valid and binding upon the corporation, although it may not prevent *existing creditors* from having recourse against the retiring stockholder, to compel contribution from him, in satisfaction of their claims, in an amount proportionate to the unpaid balance of his subscription. In what has just been said, we have referred to releases made by consent, and where no consideration of doubtful claims or compromises with insolvent or irresponsible subscribers enters into the transaction. This for the purpose of pointing out that a creditor may not complain of the act of a corporation in waiving its right to enforce relinquishment of his shares of stock. As the creditor may only be damaged by a cancellation of the subscription liability, and if this liability remains

with the subscriber after his withdrawal from the corporation, for the benefit of the complaining and non-consenting creditors, that is all that such creditors have any right to demand or insist upon."

The rule that the property of a corporation is deemed a trust fund for creditors is wholly a creation of the courts of equity, and only those having equitable rights in the fund at the time of its depletion have a right to resort to such fund to satisfy their claims. "Creditors of the corporation are not presumed to have relied upon the property of their debtor which it did not possess when the indebtedness accrued, and are therefore not held to have an equitable claim therein."

Marvin v. Anderson, 87 N. W., 226.

McDonald v. Dewey, 202 U. S., 510, was a suit instituted by the receiver of the First National Bank of Orleans, Nebraska, to enforce an assessment of \$86.00 a share on 105 shares of stock of said National Bank. The said assessment having been made upon May the 20th, 1897. It was claimed that Charles Dewey, who was the original owner of said 105 shares of stock, sold the same in 1894, at a time when the bank was insolvent, to a person whom he knew to be irresponsible, and it was claimed by the receiver that this was in fraud of the rights of creditors. The Court in this case laid down the rule, that in the event of the insolvency of the bank at the time

said shares were transferred, it was only existing creditors who could claim to have been damnified by the fraudulent transfer of the shares, and as to them, such transfers were voidable. Subsequent creditors were apprised by the published report as to whom transfers had been made and of the persons to whom they had recourse for double liability. The Court said:

“The injustice of holding a stockholder liable for an indefinite time in the future, to creditors who were apprised of the name of the stockholder by the published list, is too manifest to require an extended comment. . . . There are undoubtedly cases in which we have used the general expression that in the event of a fraudulent transfer of stock, the stockholders remain liable to the creditors of the bank, but in none of them were we called upon to discriminate between existing and subsequent creditors, since as a rule the insolvency of the bank followed soon after the transfer, and the distinction was not called to our attention by counsel. *It is manifest from the authorities and also upon principle that the trust fund doctrine created by the Courts of equity can only apply to existing creditors.* As stated in *Marvin v. Anderson*, creditors of the corporation are not presumed to have relied upon the property of their debtor which it did not possess when the indebtedness accrued, and so therefore, we think it clear that only existing creditors can complain.”

If this is so, it was necessary for the complaint to show and the Court to find there were existing creditors at the time of the payment of the \$13,000.00 for

the Wood stock, and if there were existing creditors that they had not been paid. The mere fact that the complaint in this case alleges the insolvency of the bank at the time of the payment of said money, does not alter the situation for the Court did not find that the bank was *insolvent* at the time.

V.

AS A CONDITION PRECEDENT TO THE ACTION THE STOCK
SHOULD HAVE BEEN TENDERED BACK.

In an action by a corporation against a former stockholder to recover money paid him by its president for his stock on an *ultra vires* purchase thereof for plaintiff, the complaint does not state a cause of action if it fails to show that plaintiff has returned or offered to return the stock.

Bank of San Luis Obispo vs. Wickersham, 99
Cal., 655, 34 Pac., 444.

In that case the Court said:

"The demurrer was, however, properly sustained upon the other ground stated therein. The complaint does not state facts sufficient to constitute a cause of action. The plaintiff is not entitled to any relief because of the alleged fraud practiced upon it in the sale of the stock without a complete rescission of the contract of sale; and to effect this it was incumbent upon plaintiff to act with reasonable diligence, and return, or offer to return, to defendants the stock received from them under the

contract. It cannot be permitted to retain the shares of stock thus received by it, and at the same time recover from the defendants the money paid to them as the purchase price of such stock. This would be contrary to justice and can receive no countenance in a court of equity. There is no averment in the complaint of any offer on the part of plaintiff to return the stock purchased, and plaintiff apparently rested satisfied with the contract for more than 15 years.

See also

Plymouth vs. Plymouth Gold Mfg. Co., 74
Pac., 938;
Schultz vs. O'Rourke, 45 Pac., 634.

VI.

THE FINDINGS DO NOT WARRANT THE CONCLUSION THAT
NO CONSIDERATION WAS RECEIVED BY THE BANK FOR
THE \$13,000.00.

On the contrary it appears from the findings that the valuation of the resources by the partnership was fixed by agreement (p. 75) and that, as stated by the Court below in its opinion which was written in the case of *Noyes vs. Jesson*, submitted on the same testimony as the case at bar (p. 68):

“While considerations other than the issuing of stock were paid to the partnership, the whole transaction was essentially one involving the issue of stock of the corporation for property, and the laws of Nevada, under which the corporation was or-

ganized, and by which the liability of the defendants, must be determined, provides:

“‘Any corporation existing under any law of this State may issue stock for labor done, or personal property, or real estate or leases thereof; in the absence of fraud in the transaction, the judgment of the directors as to the value of such labor, property, real estate or leases shall be conclusive’” (No. 2528, p. 1212).

The fact that some of the assets subsequently proved to be worth less than they were taken over at is of no moment, provided at the time they were honestly valued at the price paid. *The findings nowhere declare that the assets were not worth what was paid for them.* Of course with the benefit of hindsight we can now look back at the list of assets and pick out those that time has proved to be worth one hundred cents on the dollar, and these would include a large proportion of the so-called “doubtful account” (Finding XXII). But at the time these assets were turned over, they had to be valued in the light of the information then attainable. It is conceivable that the Gold Bar stock might have been considered by the directors as worth more than they were allowing for it and caused them to be more liberal in their acceptance of some of the paper than they would have been otherwise.

Nothing was allowed or asked for the good will of the old bank. A bank which has assets of over a million and a quarter dollars is certainly entitled to some-

thing for going concern value. All of which may properly have entered into the valuation placed by the directors upon the assets and business of the copartnership.

In his endeavor to compute mathematically the value or non-value of Wood's interest in the copartnership, counsel has resorted to the payment of the accrued interest on the notes transferred from the partnership. He says "It therefore appears from the findings of the court that by taking up worthless Tanana Electric Company notes of \$27,997.38 and the payment of \$39,642.81 as accrued interest \$67,640.19 were allowed the partners for which no assets were transferred to the corporation and which completely wipes out the pretended excess of \$52,000 over liabilities which was the consideration for stock."

This interest was an asset of the corporation over and above the face of the notes. It was not computed until after the resolution of March 23, 1908, which directed that it be computed to March 15, 1908 and placed to the credit of Barnette, Hill and Wood (Finding XXXIII).

This interest if previously computed and credited to Barnette et al. would have shown them entitled to a larger credit than the \$52,000 which they were allowed to take in stock or cash.

VII.

THE FINDINGS DO NOT DISPOSE OF ALL THE ISSUES TENDERED BY THE PLEADINGS, AND THE PRESUMPTION ON APPEAL IS, THAT THE OMITTED FINDINGS IF MADE WOULD HAVE SUSTAINED THE JUDGMENT.

It appears from the record that the defendant set up, among other defences, that there had been a complete accord and satisfaction between the plaintiff and one E. T. Barnette, who was a joint tort-feasor with defendant in respect of the act complained of, and that defendant had been thereby released (pp. 60-62). This defence was traversed by the reply, thus directly joining issue (p. 64). There was no finding whatever upon this subject.

It is entirely consistent with the record here that the defendant may have requested from the Court below findings upon the issues presented in the answer and reply, and that he may have excepted to the Court's omission to make such findings, yet judgment has been rendered in his favor. Suppose the evidence sustained this defense, and the omission of the Court to make the proper findings were erroneous, the judgment having been rendered in defendant's favor he cannot appeal for he does not want to reverse the judgment. The plaintiff, however, appeals and bringing up only the findings actually allowed, and omitting to bring up the evidence, presents a case on the record different from the case in the Court

below. It is even conceivable that he might show himself apparently entitled to a judgment, while the whole record would have shown the contrary.

Every intendment on appeal is in support of the judgment below, and it must be presumed here that the omitted findings if they had been actually made would have sustained the judgment.

In *James vs. Williams*, 31 Cal., 211, it was held that

“If the court does not draw up a written finding of all facts put in issue, and no exception is taken for want of a finding, the presumption is that those facts necessary to sustain the judgment and not contained in the findings were found by the court.”

In *Sears vs. Dixon*, 33 Cal., 327, the Court said:

“Under the provision of section one hundred and eighty of the Practice Act, as amended in 1866, if the losing party appeals, without having moved for a new trial, or without having excepted to the findings as defective, the written findings are of no value for any purpose to the prevailing party; nor are they of benefit to the losing party, unless they contain facts that are repugnant to or inconsistent with the judgment. The prevailing party needs no written finding. If he is not entitled to recover upon proof of the facts he alleges, a finding will not aid him, and if he is so entitled, and the decision is for him, he needs no written finding, for it is presumed that the facts essential for the support of the judgment were proved. And on the other hand, the losing party is neither benefited nor injured by the finding or the absence of a find-

ing of the facts, which, if proved, entitle the opposite party to a judgment. He is interested only in having the finding state facts repugnant to or inconsistent with those upon which the opposite party relies, whether recited in the finding or not. In other words, he is interested in having error affirmatively appear. Previous to the Act of 1861, findings were required to support the judgment; but under that Act and section one hundred and eighty above mentioned, where there is no exception on the ground that the finding is defective or wanting, it is only requisite that the finding shall not be repugnant to or inconsistent with the judgment."

In *Shelby vs. Houston*, 38 Cal., 410, it is held:

"If the appeal is allowed to stand upon the findings, the judgment will not be reversed, because all the facts requisite to sustain it have not been found; on the contrary, the missing facts will be presumed to be consistent with the judgment."

In *Steinback vs. Krone*, 36 Cal., 303, it is held:

"Where judgment for plaintiffs is rendered upon general or special findings for them, without, however, containing any reference to or express findings upon issues tendered by the answer in bar of the action, it will be presumed that all the tendered issues were found against the defendants."

And in *Lovell vs. Frost*, 44 Cal., 471, the Court said:

"Where there is no finding on an issue, it will be presumed on appeal that the court found in favor of the prevailing party."

"If the court does not expressly find on the issue made, it will be presumed that the finding on that issue was in favor of the prevailing party."

More vs. Lott, 13 Nev., 380.

Smith vs. Cushing, 41 Cal., 97, was an action of ejectment. The defendant appealed and the case came before the Supreme Court on the judgment roll. The Court said:

"When the complaint states facts sufficient to entitle the plaintiff to a recovery and the court orders judgment for plaintiff, whether any findings are filed or not, and if filed whether or not they cover all the issues tendered in the action, defendant cannot maintain the position that the facts as found do not sustain the judgment, unless he can show that such facts, or some of them, are opposed to or inconsistent with the judgment."

and the Court held that the presumption in such a case is that the court below found on the facts in issue for the plaintiff, unless the contrary appeared from the findings themselves.

In *Emmal vs. Webb*, 36 Cal., 197, the Court said, page 202:

"This finding is meager. Many of the issues are not found, and some, if they can be said to be found at all, are found inferentially instead of directly as they should have been. . . . The statute provides that a judgment shall not be reversed for the want of a finding, or for a defec-

tive finding. Under this provision we have repeatedly held that material facts not found must be presumed to be consistent with the judgment."

In *Thompson vs. O'Neil*, 41 Cal., 685, the Court said:

"The action is ejectment, and was tried before the Court without a jury. Written findings were filed, and a judgment entered for the defendant, from which the plaintiff appeals on the judgment roll alone, unsupported by a statement on appeal. The ground of error relied upon is that, on the facts expressly found, the plaintiff, and not the defendant, was entitled to judgment. But we must presume, in support of the judgment, that the Court found not only the facts included in the written findings, but also such other facts within the issues as are necessary to support the judgment. It is not enough that the written finding do not, of themselves, warrant the judgment; but to procure a reversal, the express findings must be absolutely inconsistent with the judgment, conceding all the other facts within the issues to have been found in accordance with it."

All facts within the issues, not expressly found and not inconsistent with the other findings, are presumed to have been found in accordance with the judgment.

Servanti vs. Lusk, 43 Cal., 238.

If the findings of facts are silent on certain issues, the presumption is that the finding on those issues was such as to support the judgment.

Smith vs. Penny, 44 Cal., 161.

VIII.

THE APPEAL SHOULD BE DISMISSED.

This is a proceeding in equity in which the appellant has sought to review upon the appeal a question of law alone.

He has not brought any of the evidence here.

“Equity cases must be brought up by appeal which brings up the entire record upon facts as well as the law. Cases at law can only be brought up by writ of error, which simply brings up the record for correction of errors of law; that is to say, a writ of error carries up nothing but questions of law and these questions are to be determined according to the facts found in the record. An appeal carries up everything. It substitutes the higher court in place of the lower and all questions whether of fact or of law, depending upon evidence or law, may be re-examined by the appellate court just as they were originally examined by the lower Court having original jurisdiction.”

Stevens vs. Clark, 62 Fed., 321.

It is respectfully submitted that appellant has not brought before the Court a record upon which this appeal can be properly determined.

Appellee respectfully moves the Court accordingly to dismiss the appeal pursuant to the provisions of

subdivision 8 of Rule 23 of this Court, and that the judgment be affirmed.

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CURTIS HILLYER,
Of Counsel.

United States
Circuit Court of Appeals

For the Ninth Circuit.

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AVAGNA, ELIZA GOTELLI and TERESA
CAPURRO,

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RADOVICH, Assignees,

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In the Matter of the Estate of DOMINGO GHIRA-
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Name of D. GHIRADELLI & CO., and In-
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Court for the Northern District of
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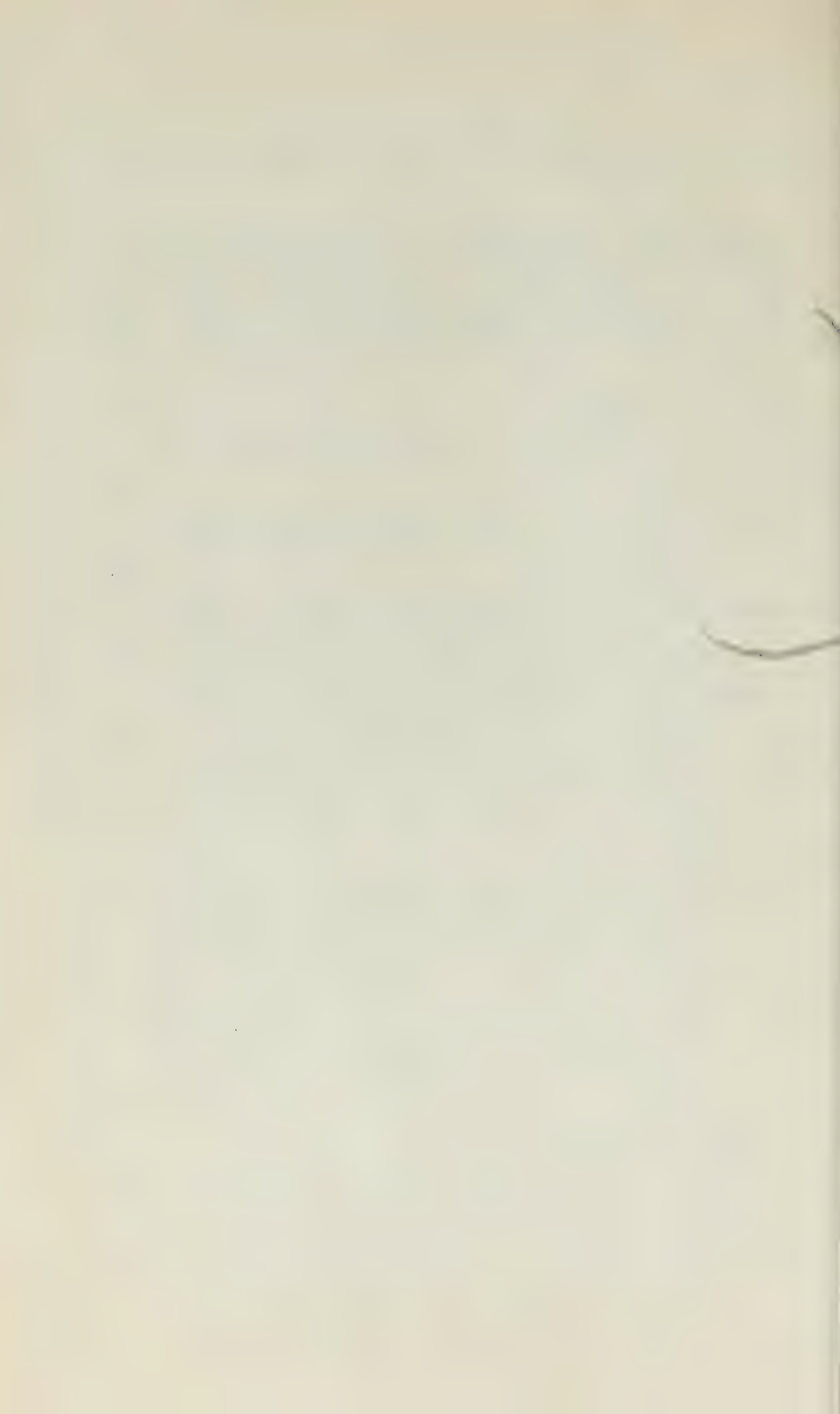
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within

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*United States Circuit Court of Appeals for the
Ninth Circuit.*

In the Matter of the Estate of DOMINGO GHIRADELLI and ANGELO MANGINI, Co-partners Transacting Business Under the Firm Name of D. GHIRADELLI & CO., and Individually, in Bankruptcy.

Petition for Revision.

To the Honorable the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

Your Petitioners Frank Cresta, Louisa Cresta, Catharina Polostrini, Rosina Paravagna, Eliza Gotti and Teresa Capurro state and allege as follows:

That they are the heirs and devisees of one Tomaso Cresta, deceased; that said Tomaso Cresta died on the — day of December, 1890, at the City and County of San Francisco, State of California, while a resident thereof;

That the will of said Tomaso Cresta was duly probated in the Superior Court for the said City and County of San Francisco, and letters testamentary duly issued to Madalina Cresta as the executrix of said will on the 7th day of January, 1891; that said Madalina Cresta resigned as such executrix on the — day of November, 1894, and A. C. Freese, the Public Administrator of said City and County, was duly appointed administrator of the estate of said Tomaso Cresta with the will annexed and letters of administration of said estate with the will annexed were duly issued to said A. C. Freese under the seal of said Court on the 17th day of December, 1894; that A. C.

Freese duly continued and completed the administration of said Estate of Tomasa Cresta, deceased; that said A. C. Freese, as such administrator made and filed his final account in said Court, together with his petition for final distribution of said estate on the 12th day of September, 1900, and, on the 24th day of September, 1900, the said final account, by order of said Court duly entered, was settled and the residue of said estate was, by the decree of said Court, duly made and entered on September 24th, 1900, distributed to your petitioners and to Joseph Cresta in equal portions;

That some time prior to January 1st, 1880, the said Domingo Ghiradelli and Angelo Mangini, partners under the firm name of D. Ghiradelli & Co. had been, by the order and decree of the United States District Court for the Northern District of California, duly made, adjudicated bankrupts; that said Tomaso Cresta was a creditor of said D. Ghiradelli & Co., and he duly proved his debt against the said bankrupts in the sum of \$1050.00; that the first dividend declared in said estate in bankruptcy was declared before the death of said Tomaso Cresta and paid to him by the assignees of said bankrupts; that the second dividend in said bankrupts' estate was declared August 31st, 1910, and the amount apportioned to the said claim of Tomaso Cresta was the sum of \$252.00; and a third dividend was declared June 1st, 1911, and the amount thereof apportioned to the said claim of Tomaso Cresta was the sum of \$78.00;

That the assignees of said bankrupts carelessly and wrongfully issued their check for the said second and third dividends respectively payable to Tomaso Cresta or order and delivered the same to a person or persons not entitled thereto, and thereafter the said checks were paid to a person or persons not entitled thereto;

That the petitioners had no information or knowledge that said Tomaso Cresta was or had been a creditor of said bankrupts, or that any dividends had been declared in his favor prior to the — day of September, 1912;

The petitioners further allege that their verified petition, alleging the foregoing facts, was, on the 2d day of May, 1914, filed in the clerk's office of the United States District Court for the Northern District of California, First Division, in which the said bankrupts' estate was still pending and unsettled; the prayer of said petition was that the assignees of said bankrupts be ordered to show cause why they should not be ordered to pay to petitioners their proportional part of the aggregate sum of the said two dividends No. 2 and No. 3, to wit, \$330.00;

That the order of said District Court requiring said assignees to show cause as aforesaid was duly issued and served upon said assignees, together with a copy of the petitioners' said petition; that the said assignees, on May 9th, 1914, made, served and filed their answer to petitioners' said petition;

That thereafter, to wit, on the — day of Sept., 1914, the matters of law and fact raised by said petition and said answer thereto were, by the order of

said District Court, referred to A. B. Kreft as the Register in said bankrupts' estate, to examine, enquire into and report thereon to said District Court, together with other matters of controversy then pending in said District Court in the said bankrupts' estate;

That, when said matters came to hearing before said Register as Referee, the said petitioners interposed a general demurrer to the answer of said assignees; that the Register overruled the said demurrer, and thereupon the said matters were submitted to said Register upon the facts stated in the said petition of your petitioners and in the said answer thereto of the said assignees;

That the said Register, on the 4th day of February, 1915, made and filed in said District Court his report, wherein he reported and decided that the said assignees "could properly deliver a check" as alleged in the answer of the said assignees, and recommend that the petition of petitioners be denied; that your petitioners, on the 13th day of February, 1915, made and filed in said District Court, their objections to the said report of said Register as Referee; that said objections to said report were argued by the attorneys for the respective parties and submitted to said Court for decision;

That thereafter, on March 26th, 1915, the said District Court made and entered its Order whereby the said report of said Register was approved;

Your petitioners state that they are advised and verily believe that the said report of the Register is erroneous and contrary to the law and that said

order of the District Court is contrary to and against the law, and that your petitioners are aggrieved thereby;

WHEREFORE your petitioners respectfully pray that the said report of the Register and the said order of the District Court approving said report be reviewed and revised by your Honors according to the merits of your petitioners' contentions; and that, by the Order and Decree of this Court the order of said District Court approving the said report of the Register be reversed and the objections of petitioners to said report of the Register be sustained; and your Petitioners pray for such other and further relief as they may be entitled to under the law and the facts.

T. Z. BLAKEMAN,
Attorney for Petitioners.

State of California,
City and County of San Francisco,—ss.

T. Z. Blakeman, being duly sworn, deposes and says: That he is the attorney for the petitioners in the foregoing petition; that the facts stated therein are within his personal knowledge, and the same are true.

T. Z. BLAKEMAN,

Subscribed and sworn to before me this 5th day of April, 1915.

[Seal] EDITH W. BURNHAM,
Notary Public in and for the City and County of San Francisco, State of California.

Received copy of the within Petition for Review,
this 5th Apl., 1915.

T. J. MIGLE,
Attorneys for Assignees.

[Endorsed]: No. 2597. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Estate of Domingo Ghiradelli and Angelo Mangini, Bankrupts, in Bankruptcy. Petition for Revision of Certain Orders of the United States District Court for the Northern District of California. Filed Apr. 5, 1915, Frank D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit. By
———— Deputy Clerk.

[Endorsed]: No. 2597. United States Circuit Court of Appeals for the Ninth Circuit. Frank Cresta, Louisa Cresta, Catharina Polostrini, Rosina Paravagna, Eliza Gotelli and Teresa Capurro, Petitioners, vs. T. V. Maxwell, C. K. McIntosh and J. L. Radovich, Assignees, Respondents. In the Matter of the Estate of Domingo Ghiradelli and Angelo Mangini, Copartners Transacting Business Under the Firm Name of D. Ghiradelli & Co., and Individually, Bankrupts. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the

Northern District of California, First Division.

Filed April 5, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit.

FRANK CRESTA, LOUISA CRESTA, CATH-
ARINA POLOSTRINI, ROSINA PAR-
AVAGNA, ELIZA GOTELLI and TERESA
CAPURRO,

Petitioners,

vs.

T. V. MAXWELL, C. K. McINTOSH and J. L.
RADOVICH, Assignees,

Respondents.

In the Matter of the Estate of DOMINGO GHIRA-
DELLI and ANGELO MANGINI, Copart-
ners Transacting Business Under the Firm
Name of D. GHIRADELLI & CO., and In-
dividually, Bankrupts.

**TRANSCRIPT OF RECORD IN SUPPORT OF
PETITION FOR REVISION**

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of Law,
a Certain Order of the United States District
Court for the Northern District of
California, First Division.

In the District Court of the United States, in and for the Northern District of California, First Division.

In the Matter of the Estate of DOMINGO GHIRARDELLI and ANGELO MANGINI, Co-partners Trading Under the Firm Name of D. GHIRARDELLI & CO., Bankrupts.

Amended Praecipe.

To the Clerk of said Court:

Sir: Please make up and certify, for use in the United States Circuit Court of Appeals for the Ninth Circuit, on the Petition for Revision by Frank Cresta et al., heretofore filed in said Circuit Court of Appeals, the following specified records and files in the matter of said bankrupts' estate, to wit:

1. Petition of Frank Cresta et al. for relief filed April, 1914;
2. The answer of the Assignees of said Bankrupts to said Petition;
3. Demurrer of Petitioners Cresta et al. to said answer of Assignees;
4. Report of Register A. B. Kreft as Referee, filed Feby. 4th, 1915, in so far as said report deals with the Petition of said Cresta et al., to wit, all on page one thereof down to and including the words, "certifies and reports" and all on page 8 of said report and all on page 9 of said report preceding the words, "Unclaimed Dividends";
5. Objections of said Cresta et al., to the report of said Referee filed Feby. 13th, 1915;

6. Minute order of said District Court approving said report of said Referee.

Dated this 17th day of Sept., 1915.

T. Z. BLAKEMAN,

Attorney for Petitioner Frank Cresta et al.

[Endorsed]: Filed Sep. 18, 1915, at 11 o'clock and
— min. A. M. W. B. Maling, Clerk. By Lyle S.
Morris, Deputy Clerk. [[1*]]

*In the District Court of the United States in and for
the Northern District of California.*

No. 726.

In the Matter of the Estate of DOMINGO GHIR-
ARDELLI and ANGELO MANGINI, Co-
partners Transacting Business Under the
Firm Name of D. GHIRARDELLI & CO.,
and Individually, in Bankruptcy.

**Petition for Relief in the Above-entitled Matter by
Catherina Polostrini, Frank Cresta, Rosina
alias Rosie Paravagna, Eliza Gottelli, Louisa
Cresta and Teresa Capurro, and Catharina Pol-
ostrini as the Administratrix of the Estate of
Giovanni Brignoli, Deceased.**

To the Honorable, the District Court of the United
States, in and for the Northern District of
California:

Your petitioners, the said Catherina Polostrini,
Frank Cresta, Rosina, *alias* Rosie, Paravagna, Eliza
Gotelli, Louisa Cresta and Teresa Capurro, and Cath-
arina Polostrini, as the Administratrix of the Estate

of Giovanni Brignoli, deceased, hereby petition the Court for relief in the above-entitled matter, and for cause state as follows:

That the said petitioners and Mary Paganini and Guisppe, alas Joseph, Cresta and Madelina Cresta were the children and heirs at law of Tomaso Cresta at the date of his decease; that the said Tomaso Cresta died in the City and County of San Francisco, being a resident thereof, on the — day of December, 1890; that he left a last will and testament, which was duly admitted to probate in and by the Superior Court of the City and County of San Francisco, State of California, on the 7th day of January, 1891; that the said Madelina Cresta was [2] named in the said will as the executrix thereof, and she was by the said order of Court admitting the said will to probate appointed as executrix of the said will, and, on the 7th day of January, 1891, duly qualified as such executrix and received letters testamentary; that said Madelina Cresta remained such executrix of the will of the said deceased Tomaso Cresta until the — day of November, 1894; that, on the — day of November, 1894, the said Madelina Cresta resigned as such executrix of the will of the said deceased Tomaso Cresta, and her resignation was duly accepted by the said Superior Court after the settlement of her accounts as such executrix;

That A. C. Freese, who was then the public administrator of the said City and County of San Francisco, was, by an order of the said Superior Court duly made and entered on the 17th day of December, 1894, appointed administrator of the estate of said

Tomaso Cresta, deceased, with the will annexed, and Letter of Administration of the said Estate with the will annexed were duly issued under the seal of the said Court to the said A. C. Freese on the 17th day of December, 1894, and the said A. C. Freese continued and remained as such administrator until the administration of the said estate was completed and closed as hereinafter alleged;

That notice to the creditors of the said decedent, Tomaso Cresta, was duly published by the said Madelina Cresta as executrix, and thereafter and at the time when the presentation of claims of creditors against the said deceased had expired, an order of the said Superior Court was duly made in the matter of the said estate of the said deceased on the —— day of December, 1892, establishing notice to the creditors of the said deceased;

That the said A. C. Freese, as administrator as aforesaid, [3] on the 12th day of September, 1900, made and filed in the said court in the matter of the said estate of Tomaso Cresta, deceased, his verified final account as such administrator, and filed therewith a petition for the final distribution of the said estate of the said deceased remaining on hand; that the said final account and petition for final distribution came on regularly for hearing by said Court on the 24th day of September, 1900, after due notice given thereof according to law, and the Court thereupon duly made and entered its order and decree settling the said final account and ordering final distribution of all the remaining portion of the said estate of the said deceased Tomaso Cresta; that, by

the terms of the said last will of the said deceased Tomaso Cresta, Madelina Cresta was given a life estate in the real property belonging to the said deceased, and all the rest, residue and remainder of the said estate was, by the decree of final distribution made and entered by the said Superior Court as aforesaid, distributed in equal portions to the children of the said deceased Tomaso Cresta, to wit: Teresa Capurro, Catherina Cresta, now Polostrini, Maria *alias* Mary Paganini, Rosina *alias* Rosie Paravagna, Eliza Cresta, now Gottelli, Louisa Cresta, Frank Cresta, Guisippe *alias* Joseph Cresta, and Giovannia Brignoli, the only child of a deceased daughter of the said Tomaso Cresta, deceased; that said child, Giovanni Brignoli, died soon after the entry of the said decree of final distribution, and one of your petitioners, the said Catherina Polostrini, is now the administratrix of his estate; that the said Catherina Polastrini was, by an order of the said Superior Court of the City and County of San Francisco duly made and entered on the 9th day of July, 1912, appointed administratrix of the estate of the said Giovanni Brignoli, deceased, and letters of administration under the seal of the said Court were duly issued to her as such administratrix. [4] on the 9th day of July, 1912, and she is still the administratrix of the estate of Giovanni Brignoli, deceased.

Your petitioners further state that the said Tomaso Cresta was a creditor of the said Domingo Ghirardelli and Angelo Mangini, and bankrupts herein, and his claim as such creditor was duly proved and allowed against the said bankrupts and their estate

prior to the declaration of the first dividend in the estate of the said bankrupts, and the amount of the said Dividend No. 1, payable to the said Tomaso Cresta, was by him, as your petitioners are informed and believe, collected; that, when Dividends No. 2 and No. 3 in the estate of the said Bankrupts were declared, to wit, Dividend No. 2, August 31st, 1910, and No. 3, June 1st, 1911, the said Tomaso Cresta had long since been deceased as aforesaid; that the proportion of the said Dividend No. 2 on the said debt of the said Tomaso Cresta was \$252.00; that the assignees of the said bankrupts issued their check for the said amount of \$252.00 payable to the order of Tomaso Cresta, and the same was carelessly and without sufficient precaution or inquiry on the part of said assignees of the said bankrupts delivered to a party or parties not entitled thereto and unknown to your petitioners, and the said check for \$252.00 was thereafter paid by the said assignees to a party or parties who were not entitled thereto and who were and are unknown to your petitioners, and your petitioners allege upon their information and belief that because of the negligence and want of proper care and inquiry on the part of the said assignees of the said bankrupts, payment of the said check for \$252.00 was made to a party or parties not entitled thereto.

Your petitioners further state that the proportion of the Dividend No. 3 awarded upon the said debt to the said Tomaso [5] Cresta was \$78.00, and the said assignees of the said bankrupts issued their check for the said amount of \$78.00 payable to Tomaso Cresta or order, and the said assignees care-

lessly and wrongfully, and without proper care or inquiry, delivered the said check for \$78.00 to a person or persons not entitled thereto and thereafter paid the said check carelessly and without proper inquiry to a person or persons not entitled thereto.

Your petitioners state upon their information and belief that the said Guisippe, *alias* Joseph Cresta, was the party who received the money on the two checks aforesaid; that the said Guisippe, *alias* Joseph Cresta died while a resident of the City of Oakland, on the —— day of September, 1912.

Your petitioners state that they had no information or knowledge that the said Tomaso Cresta was or had been a creditor of the said bankrupts, or that any dividend or dividends had been declared in his favor or checks therefor issued as aforesaid until after the date of the death aforesaid of the said Guisippe, *alias* Joseph Cresta; that the said Joseph Cresta, if he were the person who received the said checks for Dividends No. 2 and No. 3 and collected the same, had no right nor authority to receive or collect the same, and the said assignees of the said bankrupts could readily, upon the exercise of proper care and attention on their part, have discovered that neither the said Joseph (Guisippe) Cresta nor anyone, other than all of the said distributees of all the remaining estate of the said Tomaso Cresta, deceased, as aforesaid, had any right or authority to receive or to collect the said checks or either of them.

WHEREFORE, your petitioners pray for an order of Court upon the said assignees of the said bankrupts, requiring them to show cause, at the time

and place appointed by the Court, why they should not be ordered to pay to the petitioners herein [6] their proportionate part as distributees of the estate of Tomaso Cresta, deceased, of the amount of the said checks for Dividends Nos. 2 and 3, aggregating \$330.00; or that the Court will grant the petitioners such further or other order or orders for relief as they may be entitled to in the premises.

T. Z. BLAKEMAN,
Attorney for Petitioners.

State of California,
City and County of San Francisco,—ss.

T. Z. Blakeman, being duly sworn, deposes and says: That he is the attorney for the said petitioners and has prepared the foregoing petition and has knowledge of its contents; that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and that, as to those matters, he believes it to be true; that, as Attorney for the said petitioners since the 1st day of January, 1912, in matters relating to the partition among the said petitioners and other heirs of the said Tomaso Cresta, deceased, of the real estate situate in the said City and County of San Francisco belonging to the estate of the said deceased, Tomaso Cresta, he obtained knowledge of the facts set forth in the foregoing petition.

T. Z. BLAKEMAN.

Sworn to before me, this 1st day of May, 1914.

[Seal]

LYLE S. MORRIS,

Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed May 1, 1914. At 4 o'clock and 30 min. P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [7]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 726.

In the Matter of the Estate of DOMINGO GHIRARDELLI and ANGELO MANGINI, Copartners Transacting Business under the Firm Name of D. GHIRADELLI & CO., and Individually in Bankruptcy.

Answer to Petition of Frank Cresta et al. for relief.

Now come T. V. Maxwell, C. K. McIntosh and J. L. Radovich, assignees in the above-entitled matter and answering the petition of Frank Cresta, et al, hereby show;

That the above-entitled matter is pending in this Honorable Court by virtue and authority of an act of the Congress of the United States duly enacted in 1868;

That under the terms of said act said T. V. Maxwell, C. K. McIntosh and J. L. Radovich are the duly appointed, acting and constituted assignees of the above-named bankrupts;

That under and by virtue of the provisions of said

act, it is the duty of said assignees to reduce all the property coming to their hands from the estate of said bankrupts, to money and thereafter for the Register in Bankruptcy and the creditors of said bankrupts to order such dividends in favor of the creditors as the funds on hand are sufficient to pay;

That Milton J. Green was on the 31st day of August, 1910, the duly appointed, constituted and acting Register in Bankruptcy under the above-mentioned law of Congress in the above-entitled matter;

That on said day a dividend of twenty-four (24) per cent was declared at a meeting of the creditors of the above-named bankrupts and approved by said Register; [8]

That under said law, it is the duty of said Register to make a memorandum in a book provided and kept for said purpose, of the dividend payable under said order to each and every of the creditors of said bankrupts as they appear of record in said matter in proportion to the claim of each as duly proved and on file;

That on or about the said 31st day of August, 1910, said Milton J. Green, as provided by law made up said dividend book and that there appeared in said book as No. 59, Cresta, Tomaso, San Francisco, Cal., amount allowed \$1050, dividend 24% \$252.00;

That upon receipt of said book from said Register, it was the duty of said assignees to pay said dividends by drawing a check in favor of said claimant on The Bank of California National Association, in which bank said assignees are required by the rule of this

court to deposit all funds in their hands, for the amount of the dividend payable to such claimant;

That pursuant to said duty, check No. 59 was made payable to said Tomaso Cresta for the sum of \$252.00 and duly signed by said assignees and countersigned by the Register in Bankruptcy;

That, as will appear by the records in this matter, a very large proportion of said creditors employed attorneys at law to appear for them to care for their legal rights therein;

That A. D. Splivalo, an attorney at law, appeared in open court and at the hearings before the Register on several occasions as the attorney at law for said claimant, Tomaso Cresta, and for other creditors;

That when said dividend checks were ready for delivery to the various claimants said A. D. Splivalo appeared at the office of Pringle & Pringle, the attorneys for said assignees [9] and said attorneys delivered said check No. 59 payable to Tomaso Cresta, to said A. D. Splivalo as the attorney at law for Tomaso Cresta, taking said Splivalo's receipt in writing for said check;

That said check was paid by The Bank of California, National Association, and thereafter returned to said assignees cancelled;

That on the back of said check is endorsed "Madelina Cresta (her mark) Executrix of the Estate of Tomaso Cresta, Deceased. Witness A. D. Splivalo, M. J. Baggett."

Also; "All previous endorsements guaranteed, pay to Crocker National Bank, or order, Banca Popolare Operaia Italiana, Commercial Account, by

F. M. Belgrano, Cashier;”

Also; “Pay only through clearing house, Sept. 12, 1910, The Crocker National Bank of San Francisco, No. 21;”

That thereafter on the same day, through the San Francisco Clearing House, The Bank of California, National Association, by reason of said previous endorsements and not otherwise, paid the amount of said check to said Crocker National Bank and deducted the amount thereof to wit, the sum of \$252.00 from the amount on deposit with it to the credit of said assignees in the above-entitled matter, cancelled said check and returned it with many other dividend checks and a statement to the assignees;

Further answering said petition, said assignees show;

That A. B. Kreft was on the 11th day of May, 1911, the duly appointed, constituted and acting Register in Bankruptcy under the above-mentioned law of Congress in the above-entitled matter;

That on said day a dividend of seven and one-half ($7\frac{1}{2}$) per cent was declared at a meeting of the creditors of [10] the above-named bankrupts and approved by said Register;

That under said law, it is the duty of said Register to make a memorandum in a book provided for said purpose of the dividend payable under said order to each, and every of the creditors of said bankrupts as they appear of record in said matter in proportion to the claim of each as duly proved and on file;

That on or about the said 31st day of August, 1910, said A. B. Kreft as provided by law made up said

dividend book and that there appeared in said book as No. 59, Cresta, Tomaso, San Francisco, Cal., amount allowed \$1050, dividend seven and one-half per cent ($7\frac{1}{2}\%$) \$78.75;

That upon receipt of said book from said Register, it was the duty of said assignees to pay said dividend by drawing a check in favor of said claimant on The Bank of California, National Association, in which bank said assignees are required by the rule of this Court to deposit all funds in their hands, for the amount of the dividend payable to such claimant;

That pursuant to said duty, check No. 59 was made payable to said Tomaso Cresta for the sum of Seventy-eight Dollars and Seventy-five Cents (\$78.75) and duly signed by said assignees and counter-signed by the Register in Bankruptcy;

That as will appear by the records in this matter, a very large proportion of said creditors employed attorneys at law to appear for them to care for their legal rights therein;

That A. D. Splivalo, an attorney at law, appeared in open court and at hearings before the Register on several occasions as the attorney at law for said claimant, Tomaso Cresta, and for other creditors;

That when said dividend checks were ready for delivery [11] to the various claimants said A. D. Splivalo appeared at the office of Pringle & Pringle, the attorneys for said assignees and said attorneys delivered said check No. 59 to said A. D. Splivalo as the attorney at law for Tomaso Cresta, taking said Splivalo's receipt in writing for said check;

That said check was paid by the Bank of Cali-

fornia National Association, and thereafter returned to said assignees cancelled;

That on the back of said check is endorsed, "Tomaso Cresta, by J. Cresta, assignee." "A. D. Splivalo."

Also; "All previous endorsements guaranteed, pay to Crocker National Bank, or order, Fugazi Banca Popolare Operaia Italiana, Commercial account, by F. M. Belgrano, Cashier." That thereafter and below said foregoing endorsement, said Crocker National Bank placed thereon its endorsement as follows:—"Pay only through clearing house, June 1st, 1911, The Crocker National Bank of San Francisco, No. 21."

That thereafter on the same day, through the San Francisco Clearing House, The Bank of California, National Association, by reason of said previous endorsements and not otherwise, paid the amount of said check to said The Crocker National Bank and deducted the amount thereof, to wit, the sum of Seventy-eight Dollars and Seventy-five Cents (\$78.75) from the amount on deposit with it to the credit of said assignees in the above-entitled matter.

Further answering said petition the assignees allege that they have no information or belief upon the subject sufficient to enable them to answer and placing their denial on that ground, they deny that the petitioners are the heirs of said Tomaso Cresta, or that Tomaso Cresta is dead, or that his Will was probated in the City and County of San Francisco, [12] as set forth in said petition, or that said Tomaso Cresta left a last Will and Testament;

Said assignees further deny that the checks above described were carelessly or without sufficient precaution or inquiry on their part delivered to any party or parties not entitled thereto or unknown to them, but on the contrary allege that said checks were duly and regularly delivered as aforesaid to the attorney at law appearing of record for the original claimant in said matter, and that they were paid by the depository of said assignees in the usual course of its business, to an intermediate holder and endorser of said checks.

WHEREFORE, the assignees in the above-entitled matter show as above set forth, that said petitioners are not entitled to any relief from them as such assignees or from them personally or from this estate in bankruptcy, or from the Honorable District Court of the United States, for the Northern District of California, First Division, and they pray that the petition be dismissed by said Honorable Court.

E. J. PRINGLE,

Attorney for said Assignees.

State of California,

City and County of San Francisco,—ss.

T. V. Maxwell, being duly sworn deposes and says: That he is one of the assignees in the above-entitled matter; that he has read the foregoing answer to petition of Frank Cresta, et al for relief, and that the same is true according to his knowledge and belief, except as to those matters which are stated on information and belief, and as to those matters he believes it to be true.

T. V. MAXWELL.

Subscribed and sworn to before me this 9th day of May, 1914.

[Seal]

W. W. HEALEY,
Notary Public in and for the City and County of San Francisco, State of California. [13]

Received copy of within answer this 11th day of May, 1914.

T. Z. BLAKEMAN,
Attorney for Petitioners.

[Endorsed]: Filed May 12, 1914. At 10 o'clock and 30 min. A. M. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [14]

In the District Court of the United States for the Northern District of California, First Division.

In the Matter of the Estate of DOMINGO GHIRADELLI, et al., in Bankruptcy.

Demurrer of the Petitioners Catherina Polostrini et al. to the Answer of the Assignees.

Now come Catherina Polostrini, Frank Cresta, Rosie Paravagna, Eliza Gotelli, Louise Cresta, Teresa Capurro and Catherina Polostrini as administratrix of the estate of Giovanni Brignoli, deceased;

And demur to the Answer of T. V. Maxwell, C. K. McIntosh and J. L. Radovich, Assignees, to the petition of the petitioners in the above-entitled matter; and for cause of demurrer state that the said answer does not state facts sufficient to constitute any defense to said petition;

T. Z. BLAKEMAN,
Attorney for Petitioners.

I hereby certify that, in my opinion the foregoing demurrer is well founded in point of law.

T. Z. BLAKEMAN,
Attorney for Petitioners.

[Endorsed]: Filed Aug. 18, 1914. 2 P. M. A.
B. Kreft, Register in Bankruptcy. [15]

*In District Court of the United States, Northern
District of California, First Division.*

BEFORE ARMAND B. KREFT, REGISTER IN
BANKRUPTCY.

No. 726.

In the Matter of DOMINGO GHIRADELLI and
ANGELO MANGINI, Copartners Transact-
ing Business Under the Firm Name of D.
GHIRADELLI & COMPANY and Individ-
ually, in Bankruptcy.

Report of Register on Special Reference.

To the Honorable MAURICE T. DOOLING, Judge
of the District Court of the United States, in
and for the Northern District of California:

The undersigned, register in bankruptcy, to whom
on the 4th day of August, 1914, was referred
the petition "for relief by Catherina Polostrini,
Frank Cresta, Rosina *alias* Rosie Paravagna, Eliza
Gotelli, Louisa Cresta and Teresa Capurro, and
Catherina Polostrini as the administratrix of the es-
tate of Giovanni Brignoli, deceased, as heirs of one
of the original claimants, Tomaso Cresta, in this
matter; likewise the petition of G. B. Dagnino, Ad-
ministrator of the estate of G. Dagnino, deceased,

for the payment of dividends set apart to the original claimant G. Dagnino, in this matter; likewise the third account and report of the assignees and their petition for settlement of the same and for the foreclosure of the rights of all persons to the unclaimed dividends in their hands and for the declaration of a fifth and final dividend and for compensation to such assignees and to their attorneys," respectfully certifies and reports; [16]

* * * * *

Petition of Catherina Polostrini et al.

In regard to the petition of Catherina Polostrini et al., the facts are sufficiently set forth in the petition and the answer filed thereto by the assignees. The answer is endorsed: "Answer to Petition of Frank Cresta et al for Relief," filed May 12, 1914, the matter having been submitted upon the facts stated in the petition and the answer and the record on file in this matter. The substance of the matter is that petitioners claim that they were entitled to the dividends paid upon the claim of Tomaso Cresta being represented by one dividend check dated August 1st, 1910, drawn in favor of Tomaso Cresta for \$252, signed by the assignees and countersigned by Milton J. Green, then register in bankruptcy, and one check dated May 11, 1911, drawn in favor of Tomaso Cresta for \$78.75, signed by the assignees and countersigned by myself as register. The answer alleges that both of these checks were delivered to A. D. Splivalo, an attorney-at-law who appeared as attorney for said Tomaso Cresta; that subsequently said

checks were paid by the Bank of California National Association, ^{the} depository of the funds of this estate. The answer refers to the various endorsements appearing upon the checks, A. D. Splivalo being one of the endorsees.

T. Z. Blumman, attorney for the petitioners, filed a demurrer to the answer of the assignees. This demurrer was overruled by me, and the matter was then submitted as aforesaid. Said A. D. Splivalo is dead.

No appearance was made in these proceedings by said petitioners or on their behalf prior to the delivery by the assignees of said checks to said Splivalo. As the record then stood, there was no paper then on file, or appearance herein, to show that any person other than the original claimant, claimed said dividends. The moneys represented by said checks have been withdrawn from the [17] funds of this estate. No power of attorney is on file herein authorizing said A. D. Splivado to relieve payment of dividends payable to Tomaso Cresta. The checks, however, were not drawn to said Splivalo, but were drawn in the name of the claimant. In my opinion the assignee could properly deliver a check drawn in the name of the claimant, to an attorney-at-law who appeared in the proceedings, stating that he represented said claimant, the assignees at said time of delivering the checks having no notice or knowledge of other claimants to said dividends. The depository upon whom the checks were drawn, so far as the assignees were concerned, has been given no authority to pay said checks to any person other than the payee named therein, Thomaso Cresta. If the checks have

been improperly paid the liability rests upon either the endorsees or the Fugazi Banca Popolara Operata Italiana, through which bank said checks passed before being presented to the depositary of the estate, the Bank of California, N. A., or upon said depositary. As to where such liability rests, I express no opinion. Certainly said dividends cannot again be paid out the assets of this estate.

* * * * *

[Endorsed]: Filed Feb. 4, 1915. At 4 o'clock and 30 min. P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [18]

(Objections of Petitioners, C. Polostrini et al., to the Answer of the Assignees.)

In the District Court of the United States for the Northern District of California, First Division.

In the Matter of the Estate of DOMINGO GHIRADELLI, et al., Bankrupts, in Bankruptcy; FRANK CRESTA et al., Petitioners.

Now come Frank Cresta, Catherina Polostrini, Rosie Paravagna, Eliza Gotelli, Louisa Cresta, Teresa Capurro and Catherina Polostrini, as Administratrix, etc., and object to the report of the Referee, A. B. Kreft, filed herein on Feby., 1915, insofar as said Referee reports adversely upon and denies the petition of said petitioners; and for grounds of objection state the following:

1. The denial of the petition was against and contrary to the law;
2. The denial of said petition is in conflict with

the facts in the record of the estate and case, and in conflict with and against the admitted facts as shown by the report of said Referee and the records of said estate;

3. That under the law and the facts as shown by said report of said Referee and the facts shown by the records of the estate and before the Court the said petitioners were and are entitled to an order upon the said assignees for the payment to petitioners of the claims made in their said petition.

Wherefore the petitioners pray that the said report of said referee in so far as it denies the said claims of these petitioners be vacated and set aside and that the Court make *its directing* the payment of petitioners said claims with interest.

Dated this, the 12th day of February, 1915.

T. Z. BLAKEMAN,
Attorney for Petitioners.

[Endorsed]: Filed Feb. 13, 1915. At 10 o'clock and 30 min. A. M. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [19]

**[Order Confirming Report of Register as to Claims
of G. Dagnino and Tomaso Cresta, etc.]**

At a stated term of the District Court of the United States, for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Friday, the 26th day of March, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable M. T. DOOLING, Judge.

No. 726.

In the Matter of D. GHIRARDELLI, in Bankruptcy.

In this matter, the Court this day filed Opinion and ordered that the Report of Register on Special Reference as to the claims of G. Dagnino and Tomaso Cresta be, and the same is hereby, confirmed. The amount due G. Dagnini will be withheld from distribution and further effort made to discover his heirs—through investigations in Calaveras County for information as to the heirs of Serafino Gorsiglia, and that the order of February 6th, 1915, partially approving report of Register be, and the same is hereby modified as to the claim of Dagnino. [20]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing 20 pages,

numbered from 1 to 20, inclusive, to contain full, true, and correct copies of certain records and proceedings in the matter of D. Ghirardelli, in Bankruptcy, No. 726, as the same now remain on file and of record in this office; said copies having been prepared pursuant to and in accordance with "Amended Praeceptum" (copy of which is included in the foregoing transcript) and the instructions of T. Z. Blake-man, Esquire, Attorney for Petitioners herein.

I further certify that the cost for preparing and certifying the foregoing copies is the sum of Ten Dollars and Eighty Cents (\$10.80), and that the same has been paid to me by said attorney for petitioners.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said District Court this 27th day of September, A. D. 1915.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

CMT.

[Ten Cents Internal Revenue Stamp. Canceled
9/27/15. C. W. C.] [21]

[Endorsed]: No. 2597. United States Circuit Court of Appeals for the Ninth Circuit. Frank Cresta, Louisa Cresta, Catharina Polostrini, Rosina Paravagna, Eliza Gotelli and Teresa Capurro, Petitioners, vs. T. V. Maxwell, C. K. McIntosh and J. L. Radovich, Assignees, Respondents. In the Matter of the Estate of Domingo Ghiradelli and Angelo Mangini, Copartners Transacting Business Under

the Firm Name of D. Ghiradelli & Co., and Individually, Bankrupts. Transcript of Record in Support of Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the Northern District of California, First Division.

Filed September 27, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

8
No. 2597

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK CRESTA, et al.,
Petitioners,

vs.

T. V. MAXWELL, et al.,
Respondents.

In the Matter of the Estate of
DOMINGO GHIRADELLI, et al.,
Bankrupts.

PETITION FOR REVISION

To Revise, in Matter of Law, Certain Order of United
States District Court for the Northern
District of California.

BRIEF FOR PETITIONERS

T. Z. BLAKEMAN,
Attorney for Petitioners.

Filed

OCT 24 1915



No. 2597

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK CRESTA, et al.,

Petitioners,

vs.

T. V. MAXWELL and J. L. RADOVICH, As-
signees of D. GHIRADELLI, et al., Bankrupts.

STATEMENT OF THE CASE FOR PETITIONERS

This is a Petition for Revision under Section 24b of the Bankruptcy Act, to revise in Matter of Law a certain order of the District Court of the United States for the Northern District of California, First Division, made in the bankruptcy proceedings in the Matter of the Estate of D. Ghiradelli, et al., bankrupts.

The Petitioners, Frank Cresta, et al., presented their petition for relief in the Matter of said bankrupts' estate, to said District Court, May 1st, 1914. Record pp. 12-19. The said assignees filed their answer to said petition May 11th, 1914. Record pp. 19-26.

The Matter of said Petition was then by said District Court referred to A. B. Krept, Register in Bankruptcy, for report thereon. The Petitioners, before the Referee, demurred generally to the answer of the assignees. Record pp. 26-27.

The Referee overruled the demurrer, and thereupon the matter was submitted to the said Referee upon the facts stated in the said petition and answer.

The Referee made his report to the said District Court February 4th, 1915. Record pp. 27-30. The report of the Referee was adverse to the Petitioners.

The Petitioners filed objections to said report of the Referee. Record pp. 30-31. (These objections are *erroneously entitled* in the Record).

The District Court confirmed the said report of the Referee March 26th, 1915. Record p. 32.

The Petitioners excepted to said action of the District Court, and on April 5th, 1915, made, and served, and filed in this Court their Petition for Revision. Record pp. 1-7.

The Petition for Revision sets forth the main facts alleged in the Petition for Relief filed as aforesaid in the District Court, and the other pleadings and acts of Court and Referee as aforesaid.

The Referee states in his report, Record p. 28: "In regard to the petition of Catherina Polostrini, et al. (same as Frank Cresta, et al.), the facts

“are sufficiently set forth in the petition and the
“answer filed thereto by the assignees.”

The Facts:

We state here the material facts from the said petition and answer:

D. Ghiradelli and A. Mangini, partners, were duly adjudged bankrupts under the Bankrupt Act of 1867 shortly before its repeal.

The said bankrupts' estate is still in process of settlement.

One Tomaso Cresta was a creditor of said bankrupt copartnership and duly proved his claim in the sum of \$1,050, and during his lifetime collected the first dividend declared. The said Tomaso Cresta *died December, 1890*, while a resident of San Francisco, and his estate was duly administered and finally settled and distributed by the Superior Court for the said City and County of San Francisco before another dividend was declared in the estate of said bankrupts.

Decree of final distribution of the estate of said Tomaso Cresta, deceased, was made and entered by said Superior Court *September 24, 1900*, whereby all the remainder of said estate was distributed to the petitioners herein and one Joseph Cresta as the devisees and heirs of said Tomaso Cresta, deceased. Record pp. 14-15.

The next dividend, to wit: Dividend No. 2 was declared in said bankrupts' estate *August 31st, 1910*, and the amount thereof applicable to the said claim of said Tomaso Cresta was the sum of \$252.

Neither the Register in bankruptcy, nor the assignees of said bankrupts, took any notice of the death of said Tomaso Cresta, but his name was put upon the dividend sheet as if he were alive and the assignees of said bankrupt estate, to wit: the respondents herein, issued their check payable to the order of Tomaso Cresta for the \$252.

Dividend No. 3 was declared in *May, 1911*, and the said assignees likewise issued their check payable to the order of Tomaso Cresta for the sum of \$78.75, the amount applicable to the claim proved by Tomaso Cresta in his lifetime.

It is alleged by the petitioners that the assignees "carelessly and wrongfully and without proper care or inquiry delivered said checks to a person or persons not entitled thereto." (Record pp. 16-17). The assignees, however, "deny that the checks were carelessly or without sufficient precaution or inquiry delivered to any party not entitled thereto." (Record p. 25). After having stated to whom they were delivered. (See the facts stated in the answer below).

The following further allegations of the petitioners, not being denied, must be regarded as facts, to wit:

Petitioners state upon their information and belief that said Joseph Cresta was the party who received the money on the said two checks. That said Joseph Cresta diedday of September, 1912, and that petitioners had no information or knowledge that said Tomaso Cresta had been a creditor of said bankrupts, or that any dividend or dividends had been declared in his favor or checks issued therefor as aforesaid until after the date of the death aforesaid of said Joseph Cresta. Record p. 17.

Material facts stated in the answer of the assignees. The assignees allege:

That the matter of the estate of the bankrupts is pending in this (United States District Court) court by authority of an Act of Congress enacted in 1868;

That Milton J. Green was, on 31st of August, 1910, the duly appointed Register in Bankruptcy in the above-entitled matter;

That on said day a dividend of 24 per cent was declared at a meeting of the creditors of said bankrupts and approved by the Register;

That it was the duty of the Register to make a memorandum in a book kept for that purpose, of the dividend payable to each and every creditor of said bankrupts as they appear of record in said matter;

That on said 31st day of August, 1910, said Register made up said dividend book and there appeared in said book as No. 59, Cresta, Tomaso, San Francisco, amount allowed \$1,050, dividend 24 per cent, \$252;

That it was the duty of the said assignees, on receipt of said book from the Register, to pay said dividends by drawing a check in favor of the claimant on The Bank of California, the depository of all funds in their hands, for the amount of the dividend payable to such claimant;

That pursuant to said duty, check No. 59 was made payable to Tomaso Cresta for the sum of \$252, and duly signed by said assignees and countersigned by the Register;

That, as will appear by the records in this matter, a large proportion of said creditors employed attorneys at law to appear for and care for their legal rights;

That A. D. Splivalo, an attorney at law, appeared in open Court and at the hearings before the Register on several occasions as the attorney at law for said claimant, Tomaso Cresta, and for other creditors;

That when said dividend checks were ready for delivery to the various claimants, said A. D. Splivalo appeared at the office of Pringle & Pringle, the attorneys for said assignees, and said attorneys delivered said check No. 59, payable to Tomaso Cresta,

to said A. D. Splivalo as the attorney at law for Tomaso Cresta, taking Splivalo's receipt for said check;

That said check was paid by The Bank of California and thereafter returned to said assignees cancelled. Record pp. 19-21.

The answer states the same excuse for the declaring of the third dividend and the issuance of the check therefor for \$78.75. Record pp. 22-24. (The answer makes an evident mistake in stating that this latter dividend was declared and the check issued therefor on August 31st, 1910, the date of dividend No. 2 and check therefor. The Referee reports that the date of this latter check was May 11th, 1911. Record p. 28).

The allegation aforesaid of the answer that A. D. Splivalo appeared on several occasions as attorney for the claimant, Tomaso Cresta, cannot be taken to mean that said Splivalo had a warrant or power of attorney to act for said claimant as required by the Bankrupt Act and the rules thereunder, for the Referee reported that "no power of attorney is on file herein authorizing said Splivalo to receive payment of dividends payable to Tomaso Cresta." Record p. 29.

The answer further alleged that when the said check of the assignees for the \$252 was returned to them as paid by the said The Bank of California it bore endorsements as follows:

“Madalina Cresta (her mark), executrix of the estate of Tomaso Cresta, deceased. Witness A. D. Splivalo, M. J. Baggett,” also “all previous endorsements guaranteed pay to Crocker National Bank or order Banca Popolare Operaia Italiana.” (Record p. 21). And that when the check of the assignees for the other dividend No. 3 for \$78.75 was returned to them as paid and cancelled by said The Bank of California it bore endorsements as follows, to wit: “Tomaso Cresta by J. Cresta, assignee,” “A. D. Splivalo” and the bank endorsements aforesaid that were on the \$252 check. Attention is here called to the aforesaid allegation in the answer that the check of August 31st, 1910, for \$252 bore the endorsement “Madilina Cresta (her mark), executrix of the estate of Tomaso Cresta, deceased.”

Whereas, the petition alleged that Madelina Cresta was named in the will of said Tomaso Cresta as Executrix and that she was, by the order of the Court, probating said will, January 7th, 1891, appointed Executrix thereof, and that she remained such Executrix untilday of November, 1894, when she resigned as such Executrix, and that thereafter, on the 17th day of December, 1894, A. C. Freese, Public Administrator of said City and County of San Francisco, was appointed Administrator of the estate of said Tomaso Cresta, deceased, with the will annexed and that said Freese filed his final account as such Administrator with

petition for final distribution September 12th, 1900, and that by decree of said Court entered 24th September, 1900, said final account was settled and the remainder of said estate finally distributed. Record pp. 13-15. These allegations of the petition, and others not denied are admittedly true, and were so treated by the Referee.

The only *attempted* denial in the answer, except the denial of negligent delivery of the check, is as follows: Further answering said petition, the assignees allege that they have no information or belief upon the subject sufficient to enable them to answer, and placing their denial on that ground, they deny that the petitioners are the heirs of said Tomaso Cresta, or that Tomaso Cresta is dead, or that his will was probated in the City and County of San Francisco as set forth in said petition, or that said Tomaso Cresta left a last will. (Record p. 24). But an allegation in a complaint or petition of what purports to be of public record, cannot be denied for want of information or belief; besides, the Referee reported that the matter referred to him was "submitted upon *the facts stated* in the petition and the answer and the record on file in this matter." Record p. 28. The endorsement aforesaid on the check for \$252 indicates the death and last will.

Specification of Errors

relied upon by petitioners:

1. The Referee erred in overruling the demurrer of the petitioners to the answer of the respondents.

and the Court also therein erred in confirming the report of the Referee.

2. The Referee erred in holding that the "assignees could properly deliver a check drawn in the name of the claimant to an attorney at law who appeared in the proceedings stating that he represented the claimant.

3. The Referee erred in assuming that the assignees at the time of delivering said checks had no notice or knowledge of other claimants to said dividends.

4. The Referee erred in not holding that, at the date when said dividends were declared, the assignees were bound by the law to take notice of the fact that the claimant, Tomaso Cresta, was dead and that his estate had been settled in the proper Court and the remainder thereof distributed by the judgment of said Court to the persons named in said judgment as his heirs.

5. The Referee erred in not finding and reporting in favor of the petitioners in accord with their prayer.

6. The United States District Court in confirming the report of the Referee erred in each of the several particulars wherein it is hereinbefore alleged that said Referee erred.

7. The said Court erred in confirming the said report of the Referee.

8. The following are the objections, made and filed in said District Court, to the report of the said Referee, to wit:

1. The denial of the petition was against and contrary to the law;

2. The denial of said petition is in conflict with the facts in the record of the estate and case, and in conflict with and against the admitted facts as shown by the report of said Referee and the records of said estate;

3. That under the law and the facts as shown by said report of said Referee and the facts shown by the records of the estate and before the Court the said petitioners were and are entitled to an order upon the said assignees for the payment to petitioners of the claims made in their said petition.

9. The said District Court erred in not passing upon said objections and in confirming the report of the Referee.

Argument for the Petitioners

I.

The assignees illegally and wrongfully issued and delivered their said two checks payable to the order of the dead claimant.

This being true the dividends applicable to the claim proved by Tomaso Cresta, in his lifetime, are

still in the bankrupts' estate and subject to the claims of the petitioners, his heirs and distributors.

The petitioners are not attempting to have the assignees personally account for and pay to them the amount of said two checks, but are seeking to have the respondents, *as assignees* of the bankrupts' estate, pay them, as the heirs of the claimant and distributees of his estate, the dividends applicable to the claim of Tomaso Cresta since his death.

Tomaso Cresta proved his claim sometime before his death and collected the first dividend; thereafter, to wit: *December, 1890*, Tomaso Cresta died while a resident of the City and County of San Francisco, State of California. His will was duly probated January 7th, 1891, by the judgment of the Superior Court of said City and County, a Court of general jurisdiction.

The final account of the Administrator in said estate was by said Court duly settled *24th September, 1900*, and the remainder of said estate then by decree of final distribution by said Court distributed to the heirs of said decedent who are the petitioners, and Joseph Cresta. (Joseph Cresta is deceased and his interest is not represented here).

Ten years after said final settlement and distribution of the estate of said Tomaso Cresta, deceased, and twenty years after the death of Tomaso Cresta, another dividend was declared in the estate of said bankrupts, to wit: Said dividend No. 2. Cresta's

proved claim being entitled to \$252, and a year later another dividend was declared, \$78.75 being the portion thereof applicable to the claim of the deceased Cresta.

The assignees, when they issued their check for said respective sums payable to the order of Tomaso Cresta, *knew*, in contemplation of law, *that said Tomaso Cresta was dead and that his estate had been administered, finally settled and the remainder distributed to the petitioners herein.*

“The administration and distribution of the estate of a deceased person is a proceeding in rem and the action of the Court in making the distribution binds the whole world.”

The decrees of Courts having probate jurisdiction operate *in rem* and are binding and conclusive in all courts and places.

Crew vs. Pratt, 119 Cal. 139, at 150;

William Hill Co. vs. Lawlor, 116 Cal. 359;

Mulcahey vs. Dow, 131 Cal. 73;

State vs. McGlynn, 20 Cal. 235.

This latter case was reviewed by the Supreme Court of the United States in *Keily vs. McGlynn*, 21 Wall. 503, and the ruling of the California Supreme Court approved.

State vs. McGlynn and *Keily vs. McGlynn*, *supra*, involve two phases of the long contest over the will and estate of David C. Broderick, deceased.

The United States Supreme Court at the beginning of its decision in the latter case, *supra*, stated the rule as established both in England and this country, "that Courts of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof, and stated the reason of the rule, to wit:

"The constitution of a succession to a deceased persons estate partakes in some degree of the nature of a proceeding *in rem* in which all persons in the world, who have an interest, are concluded as upon *res adjudicata* by the decision of the court having jurisdiction."

In *Davis vs. Gains*, 104 U. S. 386, at 392-393, the Court quoted from the opinion in the former case of *Grignon vs. Astor*, 2 How. 319, when a sale of real estate under order of sale by a Probate Court was contested, as follows:

"The sale is a proceeding *in rem* to which all claiming under the intestate are parties."

The Court in *Davis vs. Gains* quoted with approval the ruling of the Court of Appeals of Virginia in *Ballows vs. Hudson*, 13 Gratt 672, as follows:

"A judgment of the Probate Court is classed among those which in legal nomenclature are called judgments *in rem*. Until reversed, it binds not only the immediate parties to the proceeding in which it is had, but all other persons and all other courts."

These authorities established, conclusively, that the Register in bankruptcy in the matter of the estate of said bankrupts and the said assignees, of said bankrupts at the time said dividends were declared and said checks issued, had notice of the death of Tomaso Cresta and of the proceedings in the Probate Court which resulted in the settlement and final distribution of his estate. They were interested in the decedent's estate, holding possession of the proportion of the bankrupts' estate, to which the claim proved by Cresta in his lifetime was entitled; and thus *they were as effectually bound by the decree of final distribution entered by the said Probate Court* in the matter of the estate of said Tomaso Cresta, deceased, as if they had actually entered their appearance in said proceeding.

Therefore, neither the placing of the name of Tomaso Cresta on the dividend sheets, nor the issuance and delivery of checks in his name long after his death and the distribution of the remainder of his estate to the petitioners herein, could conclude or affect the rights of petitioners under said decree of final distribution.

II.

If the claimant, Tomaso Cresta, had been alive when the dividends were declared and the checks therefor made in his name, *the delivery of the checks as alleged in the answer of the assignees, would not have bound or concluded the said creditor.*

The checks issued by the assignees in the name of Tomaso Cresta were delivered to one A. D. Splivalo, an attorney-at-law, and the excuse of the assignees for such delivery is that said "Splivalo appeared in open Court and at hearings before the Register on several occasions as the attorney-at-law for said claimant, Tomaso Cresta, and for other creditors; that when said dividend checks were ready for delivery said Splivalo appeared at the office of Pringle & Pringle, the attorneys for said assignees, and said attorneys delivered said check to said Splivalo as the attorney-at-law for Tomaso Cresta." Record p. 21 and p. 23.

The answer does not allege when said Splivalo had appeared as attorney-at-law for Tomaso Cresta, presumably, however, before Cresta's death, twenty years before the checks were delivered. The answer does not allege that Splivalo held a warrant or power of attorney to so act, or to act at all for Cresta. If he had, Cresta's death revoked it.

But the Referee reported that "no power of attorney is on file herein authorizing said Splivalo to receive payment of dividends payable to Tomaso Cresta." Record p. 29.

The Bankruptcy Act of 1867 provided that "Any creditor may act at all meetings by his duly constituted attorney the same as though personally present." Loveland on Bankruptcy, p. 1230. This provision of the law would prevent an attorney-at-

law, as such, from receiving or collecting any dividends.

When the dividends in question were declared and the checks delivered (August 1910 and May 1911) the Bankrupt Act of 1898 was in force, the Act of 1867 having been repealed in 1880.

Trustees under the Act of 1898 had duties similar to those of assignees under the Act of 1867. The estate originating under the old act, are managed and distributed by the Courts acting under present rules, and the assignees in old holdover estates, it seems, would have to conform to the provisions of the recent Act and the general orders made by the Supreme Court.

Therefore, we submit that the following authorities are applicable and govern the acts of assignees of an old estate, performed or to be performed since the Act of 1898 and the general orders therein provided for took effect.

“Checks should always run to and be mailed or delivered to the creditors *unless the power of attorney specifically* authorizes the attorney to receive and receipt therefor.”

Collier on Bankruptcy, p. 393.

General Order XXI, Sub. 5, provides how the execution of any letter of attorney to represent a creditor may be acknowledged or proved.

“An attorney-at-law cannot vote at a creditors’ meeting without producing a letter of attorney from the creditor.”

Loveland, p. 269, Sec. 105 and cases cited, including *in re Lazons*, 120 Fed. 716.

“The trustee should forthwith (on declaration of dividend) give notice to creditors when and where a check or warrant for dividends may be obtained. If the creditor cannot personally attend, the warrant may be delivered to a person authorized in writing to receive it.”

Loveland on Bankruptcy, p. 732 and pp. 854-5.

The assignees were clearly without even a semblance of authority for delivering the checks to Splivalo.

III.

Attention is called to the endorsements on the checks as disclosed by the assignees’ answer. The check for \$252, issued in name of Tomaso Cresta and dated August 31st, 1910, when returned to the assignees as paid and cancelled, bore the endorsement: “Madalina Cresta (her mark) Executrix of the Estate of Tomaso Cresta, deceased.” Record p. 21. Here was direct personal notice to the assignees that Tomaso Cresta was dead and that Madalina Cresta assumed, at least, to act as Executrix of his estate. They were thus by direct notice put upon inquiry whether Madalina Cresta was the Executrix of said decedent’s estate. Inquiry would have shown the assignees personally that which they

already in contemplation of law, knew. (See Point II, *supra*, to wit: That Madalina Cresta had resigned as Executrix sixteen years before the date of the check and had been succeeded by A. C. Freese, who had ten years before the date of the check closed said estate with final decree of distribution in favor of petitioners.

The check of May 11th, 1911, for \$78.75, when returned to the assignees as paid and cancelled, bore the endorsement: "Tomaso Cresta, by J. Cresta, assignee."

And this was another notice to the assignees of something wrong, and if they had followed it up they could probably have recovered the money that they had negligently and illegally afforded a person other than the rightful parties to receive money belonging to the estate of the bankrupts.

It will be for the creditors, of said bankrupts, at some future meeting to determine whether the said assignees shall be required to reimburse the said estate for the amount of the said two checks illegally issued and delivered to person not entitled.

The petitioners herein seek their proportion of the assets of said bankrupts' estate, applicable to the claim of Tomaso Cresta since his death.

Respectfully submitted,

T. Z. BLAKEMAN.

Attorney for Petitioners.

No. 2597

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK CRESTA et al.,
Petitioners,

vs.

T. V. MAXWELL et al.,
Respondents.

In the Matter of the Estate of
DOMINGO GHIRADELLI et al.,
Bankrupts.

BRIEF FOR RESPONDENTS.

E. J. PRINGLE,
Attorney for Respondents.

Filed this.....day of October, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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BRIEF FOR RESPONDENTS.

The petition in bankruptcy in this matter was filed in the United States District Court on the 6th day of June, 1870. It has, therefore, been pending, always in a more or less animate condition, in that Court for upwards of forty-five years. The Court will, therefore, see that, though the case is at last practically ready to be closed, nearly all the original claimants and their attorneys have predeceased it.

Argument.

Upon the title page of the printed petition or record it is stated that the appeal is taken under Section 24b of the Bankruptcy Act of July 1st, 1898, i. e., the present act under which the Courts are operating. The same statement appears again on page six and in one or two other places in the record. It is also claimed by counsel for the appellant on page seventeen of his brief and in numerous other places that this act controlled in the matter of distribution of dividends and in the employment of attorneys. This is not so.

The act of June 7, 1878, Chap. 160, Vol. 20, U. S. Stat. at Large, page 99, repealed the old bankruptcy act approved March 2, 1867, under which act this matter was commenced, but provided that said act shall continue in full force and effect until matters pending at the time of repeal shall be fully disposed of in the same manner as if said act had not been repealed.

Counsel for appellants enters into a lengthy argument to show that Tomaso Cresta, the original claimant, being dead, the register and assignees in this matter had constructive notice thereof, and should have made checks for dividends to some representative of the deceased Cresta, and that, in fact, the officers of the United States District Court, viz., the register and assignees were parties to the probate proceedings, if any were taken, which latter fact the appellees do not admit, as proceedings *in rem*.

It hardly seems necessary to answer this argument. The cases cited by counsel do not hold such to be the law. It is well settled that the United States Courts and its officers acting in bankruptcy matters cannot be interfered with by Courts constituted in other jurisdictions.

See,

Blumenstiel's Law and Practice in Bankruptcy, p. 384.

Section 5102 of Revised Statutes provides that when a dividend is ordered, the register and assignees shall prepare a list of creditors entitled to the dividend and make up a sheet showing the amount each creditor is entitled to. Thereafter under rule XXVIII, the assignees are required to follow this sheet and make out checks in the name of each claimant for the amount set opposite such name by the register. The law and this rule were strictly followed in this case. All these steps are very fully set forth in the answer which appears in the record, and it is not necessary to repeat them here. These assignees and the register as officers of the Court have done what the law and the rules of the Court require them to do, and nothing more nor less. The record shows no notice to them actual or constructive of the death of Tomaso Cresta, but had they had such notice, there is nothing that would have required them, or made it proper for them, to depart from the method pursued as set up in the answer.

As a result of the foregoing the practice is to make all checks in the name of original claimants and deliver to such claimants or their legal representative, thereafter to be paid in coin by the depository when regularly endorsed, in accordance, if the claimant be dead, with any letters testamentary or of administration or decrees of distribution, issued by a probate Court, which such representative may produce to the bank.

It is immaterial who received the checks. Delivery to an attorney at law conferred no authority to collect.

These particular checks having been paid on wrong, not to say forged, endorsements, the responsibility rests on the bank that paid them and guaranteed such endorsements to the Bank of California, and neither on this estate nor upon the depository of its funds, nor upon these assignees.

We, therefore, respectfully submit there has been no error.

Dated, San Francisco,
October 25, 1915.

E. J. PRINGLE,
Attorney for Respondents.↳

